This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

+ *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.

+ *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.

+ *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.

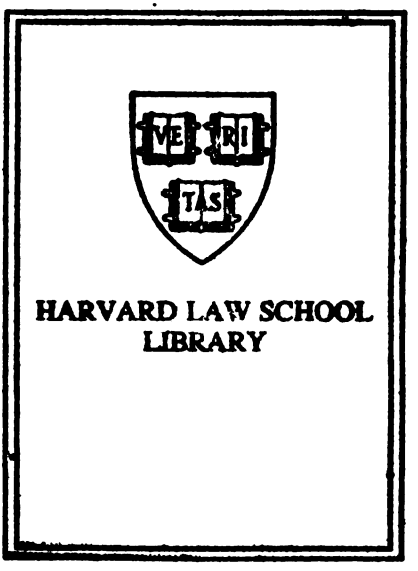
+ *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at `http://books.google.com/`

HARVARD LAW LIBRARY
3 2044 078 577 681

Digitized by Google



Digitized by Google

Digitized by Google

Digitized by Google

MICHIGAN REPORTS.

REPORTS OF CASES

HEARD AND DECIDED IN

The Supreme Court of Michigan

FROM

OCTOBER 12, 1863, TO OCTOBER 18, 1864.

THOMAS M. COOLEY, REPORTER.

VOL. VIII.
BEING VOLUME XII OF THE SERIES.

HARVARD LAW LIBRARY

ANN ARBOR:
PUBLISHED BY THE REPORTER.
1864.

Digitized by Google

Entered according to Act of Congress, in the year 1864, by
THOMAS M. COOLEY,
In the Clerk's Office of the District Court of the United States for the Eastern District of Michigan.

6-7-1865

ADVERTISER & TRIBUNE PRINT, DETROIT.

Digitized by Google

Supreme Court of Michigan.

GEORGE MARTIN, Chief Justice.

RANDOLPH MANNING,
To August 31, 1864.
ISAAC P. CHRISTIANCY,
JAMES V. CAMPBELL,
} *Associate Justices.*

ALBERT WILLIAMS, *Attorney General.*

Judges of Circuit Courts.

First Circuit.
EDWARD H. C. WILSON.
To January 1, 1864.
FRANKLIN JOHNSON,
From January 1, 1864.

Second Circuit.
NATHANIEL BACON,
To January 1, 1864.
PERRIN M. SMITH,
From January 1, 1864.

Third Circuit.
BENJAMIN F. H. WITHERELL.

Fourth Circuit.
EDWIN LAWRENCE.

Fifth Circuit.
BENJAMIN F. GRAVES.

Sixth Circuit.
SANFORD M. GREEN.

Seventh Circuit.
JOSIAH TURNER.

Eighth Circuit.
LOUIS S. LOVELL.

Ninth Circuit.
FLAVIUS J. LITTLEJOHN.

Tenth Circuit.
JAMES BIRNEY,
To January 1, 1864.
JABEZ G. SUTHERLAND.
From January 1, 1864.

Eleventh Circuit.
DANIEL GOODWIN.

Digitized by Google

Probate Clerks.

The following rule was adopted by the Supreme Court July 14, 1864:

Ordered, That Probate Clerks appointed in pursuance of paragraph 3652 of the Compiled Laws, shall have power to file all probate papers, and papers pertaining to the business of the Probate Court; to record all its orders and proceedings, and such papers as shall be directed to be recorded by the Court, and to issue subpœnas for the appearance of witnesses in said Court, and to give certified copies of all papers and proceedings.

Digitized by Google

TABLE OF CASES REPORTED IN THIS VOLUME.

Adams v. Bradley *et al.* . . 346
Allison, Fiquet *et al*, v. . . . 328
Andrews v. Kibbe, *et al.* . . . 94
Andrews, *et al.*, Kibbe v. . . 94
Angell v. Rosenbury 241
Atwater *et al.*, Emerson v. . . 314
Auditor General, People v. . 171
Avery v. Payne 540
Avery, Payne v. 540

Bagg, Welch v. 41
Barnard *et al.*, Fitzhugh v. . . 104
Bank of Lansingburgh, Ives v. 361
Bank of Pontiac, People v. . 527
Beard v. Spalding 309
Beaubien *et al.* v. Cicotte *et al.* 459
Bennett v. Nichols *et al.* . . 22
Blanchard v. Tyler *et al.* . . 339
Bower v. Town *et al.* 230
Bradley *et al.*, Adams v. . . 346
Bresler v. Pendell 224
Butler *et al.* v. LaDue *et al.* . 173

Carr, Myers *et al.* v. 63
Carter v. Hobbs, ... 52
Caruthers v. Humphrey *et al.* . 270
Cicotte *et al.*, Beaubien *et al* v. 459
Cuddy *et al.* v. Major *et al.* . . 368

Dean, Goodspeed v. 352
DeGraff, Niagara Fire Insurance Co. v. 10, 124
Detroit City v. Detroit & Erin Plank Road Co. 333
Detroit City, Farmers & Mechanics' Bank v. 445
Detroit City, Goodrich v. . . 279
Detroit & Erin Plank Road Co., Detroit City v. 333
Detroit & Milwaukee R. R. Co. v. Griggs *et al.* 45
Detroit Young Men's Society, Regents of University v. . 133
Dewey *et al.*, Farwell *et al.* v. . 436
Dodge v. Stanton 408

Eaton *et al.*, Ramsdell v. . . 117
Emerson v. Atwater *et al.* . . 314
Evans v. People 27
Farmers & Mechanics' Bank v. City of Detroit 445
Farrell v. Taylor 113
Farwell *et al.* v. Dewey *et al.* . 436
Fiquet *et al.* v. Allison . . , 328
Fitzhugh v. Barnard *et al.* . . 104
Flanigan v. Lampman . . . 58
Fralick, People v. 234
French *et al.* v. Highway Commissioners of Springwells . 267

Gard v. Stevens. 9, 292
Goodrich v. Detroit City, . . 279
Goodspeed v. Dean 352
Gray v. Howard 171
Gregory *et al.* v. Stanton *et al.* . 61

Digitized by Google

Griggs *et al.*, Detroit & Milwaukee R. R. Co. *v.* . . . 45

Hall, Peoria Marine and Fire Insurance Co. *v.* 202
Hanson, Olcott *v.* 452
Hartwell, People *v.* 508
Henning *et al.*, Sleight *et al. v.* 371
Hickey *v.* Hinsdale 99
Highway Com'rs of Springwells, French *et al. v.* . . 267
Hilliker *et al.* Thorne *v.* . . 215
Hinsdale, Hickey *v.* 99
Hobbs, Carter *v.* 52
Hopkins, Hunter *v.* 227
Howard, Gray *v.* 171
Humphrey *et al.*, Caruthers *v.* . 270
Hunter *v.* Hopkins 227
Huntington *et al. v.* Wellington 10

Ives *v.* Bank of Lansingburgh 861

Jacobs *v.* Stokes 381
Johnson *et al. v.* Provincial Insurance Co. 216

Kibbee *et al.*, Andrews *v.* . . 94
Kibbee *v.* Andrews *et al.* . . 94

LaDue *et al*, Butler *et al. v.* . 178
Lampman, Flanigan *v.* 58
Lawrence, Smith *v.* 431
Leonard *v.* Taylor *et al.* . . . 398

Major *et al.*, Cuddy *et al. v.* . 368
Marvin *v.* Schilling *et al.* . . 356
Michigan Ins. Co. *v.* Whittemore *et al.* 811, 427
Miles *et al.*, Roberts *v.* . . . 297
Mitchell, Smith *v.* 180
Mowrey, Tucker *et al. v.* . . 378
Myers *et al. v.* Carr 63

Niagara Fire Insurance Co. *v.* DeGraff 10, 124
Nichols *et al.*, Bennett *v.* . . . 22

Olcott *v.* Hanson 452

Palmer *v.* Rich 414
Payne, Avery *v.* 540
Payne *v.* Avery 540
Pendell, Bresler *v.* 224
Peoria Marine & Fire Insurance Co. *v.* Hall 202
People *v.* Auditor General . . 171
People *v.* Bank of Pontiac . . 527
People, Evans *v.* 27
People *v.* Fralick 234
People *v.* Hartwell 508
People *v.* Quartermaster Gen'l . 191
People *v.* River Raisin & Lake Erie R. R. Co. 389
People, Tillman *v.* 401
People *v.* Township Board of Springwells 434
People *v.* Wilson 25
Perkins *v.* Perkins 456
Pew *et al v.* Yoare 16
Provincial Insurance Co., Johnson *et al. v.* 216

Quartermaster Gen'l, People *v.* 191
Quinlon *v.* Rogers 168

Ramsdell *v.* Eaton *et al.* . . . 117
Regents of the University *v.* Detroit Young Men's Soci'y 138
Rich, Palmer *v.* 414
Richmond *v.* Robinson *et al.* . 193
Riggs *et al.*, Sage *v.* 818
River Raisin & Lake Erie R. R. Co., People *v.* 389
Roberts *v* Miles *et al.* . . . 297
Robinson *et al.*, Richmond *v.* . 193
Rogers, Quinlon *v.* 168
Rosenbury, Angell *v.* 241
Rowe *v.* Wright 289

Sage *v.* Riggs *et al.* 818
Sage *v.* Walker *et al.* 425

Digitized by Google

Schilling *et al.*, Marvin *v.* . . , 356
Sleight *et al. v.* Henning *et al.* . 371
Smith *v.* Lawrence 431
Smith *v.* Mitchell 180
Spalding, Beard *v.* 309
Sprague, Thomas *v.* 120
Stanton, Dodge *v.* 408
Stanton *et al.*, Gregory *et al. v.* 61
Stevens, Gard *v.* 9, 292
Stokes, Jacobs *v.* . . . . . , 381

Taylor, Farrell *v.* 113
Taylor *et al.*, Leonard *v.* . . . 398
Teller *v.* Willis 268, 384
Thomas *v.* Sprague 120
Thorne *v.* Hilliker *et al.* . , . 215
Tillman *v.* People 401
Town *et al.*, Bower *v.* 280
Township Board of Springwells, People *v.* 434
Township of Texas *v.* Wager . 89
Tucker *et al. v.* Mowrey . . . 378
Tyler *et al.*, Blanchard *v.* . . 339

Underwood *v.* Waldron *et al.* . 73

Van Renselaer *v.* Whiting *et al.* 449

Wager, Township of Texas *v.* . 89
Waldron *et al.*, Underwood *v.* . 73
Walker *et al.*, Sage *v.* 425
Welch *v.* Bagg, ... 41
Wellington, Huntington *et al. v.* 10
Whiting, Van Renselaer *v.* . . 449
Whittemore *et al.*, Michigan Insurance Co. *v.* . . . 311, 427
Willis, Teller *v.* 268, 384
Wilson, People *v.* 25
Wright, Rowe *v.* 289

Yoare, Pew, *et al. v.* 16

Digitized by Google

Digitized by Google

OCTOBER TERM, 1863, AT DETROIT.

Joseph Gard v. James E. Stevens.

Settlement of case made.—A case made after judgment for review by this Court, must show on its face that it is settled and signed by the Circuit Judge for that purpose.

Heard and decided, October 24th.

Motion to dismiss for want of jurisdiction.

The county clerk of Berrien transmitted to this Court a paper, with his certificate attached, that it was "a full, true and complete copy of the case made and signed by N. Bacon, Circuit Judge, as the same appears to me from the files in my office." The paper was entitled in this cause, and was a narrative of the proceedings therein, to and including the rendition of judgment. It was signed by the Circuit Judge, but it was no where stated in the paper itself to be a case made, nor was there any recital therein that the parties had appeared before the Judge for the purpose of settling a case, or that he had settled the same.

C. I. Walker, for the motion, argued that there was nothing in this paper to indicate that it was designed as a case for review in this Court. It might have been prepared for any other purpose; and this Court could not presume that it had been deliberately settled by the Judge, on a hearing of the parties, where nothing appeared in the paper to show that fact.

Digitized by Google

G. V. N. Lothrop, contra.

THE COURT held the case to be defective, because not showing that it was settled and signed by the Circuit Judge for review by this Court; but allowed it to be remitted to the Court below for correction.

The Niagara Fire Insurance Company v. Henry DeGraff.

Amending exceptions.—This Court will not, by consent of parties, treat that as a part of a bill of exceptions which is not actually incorporated therein by the Judge who settled the same.

Decided October 24th.

Error to Lenawee Circuit. A bill of exceptions had been settled in the cause, but afterwards it was stipulated by the parties that a portion of the charge of the Court, not embraced in the bill as settled, should be considered as constituting a part of the bill for the purposes of the argument in this Court.

But the COURT held, that the bill of exceptions could not be thus altered by consent of the parties, without the knowledge and consent of the Judge who tried the cause. Nothing can be considered as a part of the bill of exceptions except what is actually incorporated therein, and settled by the Judge himself.

C. A. Stacey and *C. I. Walker*, for plaintiff in error.

A. L. Millerd and *T. M. Cooley*, for defendant in error.

Joseph L. Huntington and another v. William Wellington.

Statute of Frauds: representations as to credit, &c, of another: promise to answer for debt of another: interest in lands.—Suit on a guaranty, not in writing, that certain notes sold by defendant to plaintiffs were good and collectable, and the makers responsible; and that the maker of a certain mortgage sold at the

Digitized by Google

same time was responsible and able to pay; that the land mortgaged was ample security and the title perfect and unincumbered. Held, that the guaranty was not within the prohibitions of the Statute of Frauds, and was valid.

Such guaranty is not within the provision which exempts persons from being charged upon parol representations concerning the credit and ability of others; as that is confined to cases where the representations form no part of a contract.

Nor is it an agreement to pay the debt of another, in the sense of the statute requiring such undertaking to be in writing. Where a guaranty is cotemporaneous, and made upon the same consideration with the original debt, or where it is made subsequently upon some new consideration of forbearance or otherwise, and is really a collateral promise to the undertaking of another, it must be in writing, or it is void. But where the guaranty of another's debt is merely incidental to a principal contract made by the guarantor himself, on his own account, it is regarded as, in effect, a promise to pay his own debt, and therefore need not be in writing.

The guaranty of the mortgage is not within the statute (§3177 *of Comp. Laws*), which provides that "no estate or interest in lands, except," &c., "nor any trust or power over or concerning lands, or in any manner relating thereto, shall hereafter be created, granted, assigned, surrendered or declared unless" "by deed or conveyance in writing," &c. It does not in any way affect the title to land, nor does it raise or affect any trust, power or authority in or over the land mortgaged. It is simply an undertaking that certain facts exist; and if inserted in a deed of conveyance, would be simply a personal covenant which would not run with the land.

Submitted on briefs, July 17th. Decided, October 27th.

Error to Eaton Circuit. The case is fully stated in the opinion.

Barnes & Huntington and *J. W. Longyear*, for plaintiffs in error.

M. S. Brackett and *I. S. Crane*, for defendant in error.

MANNING J.:

Plaintiffs had a judgment against one Hall, which they sold to defendant, and received in payment two promissory notes against one Mott, and a mortgage given by one Ryan. The declaration, which is in assumpsit, states that defendant represented and warranted that the promissory notes were good and collectable, and that Mott was pecuniarily responsible and able to pay them; also that Ryan was pecuniarly responsible and able to pay the mortgage, and that the mortgaged premises were worth more than

Digitized by Google

enough to pay the mortgage, and that they were unincumbered, &c. On the trial, parol evidence was offered to prove the representations and warranty. The evidence was objected to, and ruled out of the case by the Court; because it was not in writing. We are referred to several statutory provisions in support of the decision of the Court.

1st. Every special promise to answer for the debt, default, or misdoings of another person, is required to be in writing:—*Comp. L.* § 3183.

The promise here referred to is a collateral promise, made simultaneously with, or previous to, the promise creating the debt guaranteed by it; as when A trusts B., not upon B's promise only, but upon his promise and that of a third person, as C., who, at the same time promises to pay A., in case B. fails to pay him. The statute has no reference to a separate, independent promise made subsequently to the creation of the debt, and for a new consideration. The two promises must have a simultaneous origin, and spring from the same root. In other words, they must be twin contracts. Where A. trusts B., and C. afterwards, for a new consideration moving from A., promises to pay what B. is owing him, if he cannot collect it of B., the undertaking is an original, independent contract, not within the statute. It is a guaranty of a pre-existing debt, and not a guaranty having its origin in the creation of the debt or duty guaranteed, which is the promise meant by the statute. The cases do not all agree, but such it seems to me is the principle to be deduced from them. When the promise has its origin in the creation of the debt or duty, the consideration that supports one supports the other. When it does not so originate, but is made subsequently, the consideration of the debt or duty will not support the promise, but there must be a new consideration to give it effect, and the promise is then said to be an original, independent promise, not within the statute:—*Farley v. Cleveland*, 4 *Cow.* 432; *same case*,

Digitized by Google

9 *Cow.* 639; *Chapin v. Merrill*, 4 *Wend.* 657; *Meach v. Smith*, 7 *Wend.* 315; *note to Brown v. Curtis*, 2 *Conn.* 553 (*case* 225); *Thomas v. Dodge*, 8 *Mich.* 51. There are cases within the statute that, at first view, seem to be the guaranty of a pre-existing debt, but in fact are not, but of a new promise. As where a creditor agrees with his debtor to give him time in consideration of security for payment at a future day. Such promise must be in writing. For the undertaking of the surety is the performance of the contract granting the extension, and not the payment of the original debt, which is merged in the new promise, and made the basis of a new debt to be paid at a future day.

2nd. No action shall be brought to charge any person, upon or by reason of any favorable representation or assurance made concerning the character, conduct, credit, ability, trade or dealings of any other person, unless such representation or assurance be made in writing, &c.:—*Comp. L.* § 3186 The representations and assurances here spoken of, are not representations or assurances made by a party to a contract, but by a third person, knowing them to be false, and making them for corrupt and dishonest purposes, to the injury of another. If one seeks information of another, with a view to some future action, and makes such information the basis of his action, and thereby sustains a loss, the statute will not permit him to allege the deception practiced on him by his informant, unless the information he acted on was in writing.

3rd. A warranty or representation that real estate is unincumbered, is not the creation, granting, assigning, surrendering, or declaring of any estate or interest in land, or of a trust or power over or concerning land, which the statute requires to be in writing:—*Comp. L.* § 3177. It is the warranty or representation of a fact, and not the creation or granting of a title or interest in land.

As the proposed evidence did not come within either

Digitized by Google

of these statutory provisions, the Court erred in refusing to receive it. The judgment, I think, should be reversed, and a new trial ordered.

CAMPBELL J.:

This suit was brought on an alleged guaranty, that certain notes, sold by defendant to plaintiffs, were good and collectable, and the makers responsible, and that the maker of a certain mortgage, sold at the same time, was responsible and able to pay; that the land mortgaged was ample security, and the title perfect and unincumbered. The notes and mortgage were sold by Wellington to plaintiffs, in exchange for a judgment against one Hall, which they assigned to said Wellington.

The warranty was not in writing, and the testimony going to prove it was excluded by the Court below, as within the prohibition of the Statute of Frauds. And this exclusion is sought to be maintained:

1st. As within the law relating to promises to pay the debt of another: 2nd. As within the provision declaring that no one shall be charged by reason of any favorable representation or assurance made concerning the character, credit, ability, trade or dealings of any other person, unless the same shall be in writing, and signed: 3rd. As within the law requiring agreements for the transfer or charging of the title of lands to be in writing. I am of opinion that none of the statutes referred to apply to the case, and that the agreement is not within any prohibition of the Statute of Frauds.

The statute which exempts persons from being charged upon parol representations concerning the credit and ability of others, is confined to cases where the representations form no part of a contract. A distinction has always been taken between promises to answer for the debt of another, and mere false representations concerning his credit, which were not agreements. The statute covering these repre-

Digitized by Google

sentations was passed to remedy the defect existing in the Statute of Frauds, which permitted actions on verbal representations, while it prohibited actions on verbal promises. The two are entirely distinct, and the actions are different; the one being in assumpsit, and the other in case:—*Pasley v. Freeman*, 3 *T. R.* 51; *S. C.* 2 *Smith Lead. Cas.* 55 *and notes; Browne St. of Frauds*, 181, 182.

The promise, or warranty, was not an agreement to pay the debt of another in the sense of the statute requiring such undertaking to be in writing. Where a guaranty is cotemporaneous, and made upon the same consideration with the original debt, or when it is made subsequently upon some new consideration of forbearance or otherwise, and is really a collateral promise to the undertaking of another, it must be in writing or it is void:—*Brown v. Hazen*, 11 *Mich.* 219; *Hall v. Soule*, 11 *Mich.* 494. But where the guaranty of another's debt is merely incidental to a principal contract made by the guarantor himself, on his own account, it is regarded as in effect a promise to pay his own debt, and therefore need not be in writing. It is unnecessary to consider what classes of contracts may be found involving this consequence, as the case before us is in all respects within decisions made by our own Courts.

Where the guaranty is made upon a sale of the instrument guaranteed, it has always been regarded as a mere incident of the contract of sale, and therefore an original contract of the guarantor on his own account. This was decided by us in *Thomas v. Dodge*, 8 *Mich.* 51, where a reference is made to some other similar decisions.

There is no foundation for any argument which would bring the guaranty of the mortgage within the statute relating to lands. It does not in any way affect the title to land, nor does it raise or affect any trust, power or authority, in or over the land mortgaged. It is simply an undertaking that certain facts exist, and if inserted in a deed of conveyance would be but a personal covenant, which would not run with the land.

Digitized by Google

The Court erred in excluding the testimony. The judgment should be reversed, and a new trial granted.

MARTIN CH. J. concurred with CAMPBELL J.

CHRISTIANCY J., did not sit in this case.

Judgment reversed.

Theodore Pew and another v. Peter Yoare.

Plea of another suit pending.—In a suit commenced by attachment, a plea in abatement was interposed, that *at the time of the commencement of the suit* another suit was pending between the same parties, for the same cause of action. It was held that the plea was bad, because it did not state that the former suit was still pending:—*Wales v. Jones*, 1 *Mich.* 254.

Recovery in attachment suit not limited to amount sworn to be due.—In an attachment suit, the plaintiff is not limited in his recovery by the sum sworn to be due in the affidavit on which the attachment was issued, if, by the proof, a greater amount is shown to be due.

Certiorari to justice: error not affecting the merits.—Whether a Circuit Court should reverse the judgment of a justice of the peace on certiorari, because the judgment rendered exceeds the amount claimed in the *ad damnum* clause of the declaration, quere?

Heard, July 17th. Decided, October 27th.

Error to Berrien Circuit Court, into which the suit was brought by certiorari, directed to J. W. Brewer, a justice of the peace.

The writ of certiorari was allowed upon the affidavit of Theodore Pew, one of the defendants in the justice's court, alleging as grounds of error,—First, that the said justice erred in overruling the demurrer of said defendants, to plaintiff's replication, for the following reasons: 1st. Such replication was no wise in answer to, or put in issue, anything alleged or set forth in the said plea in abatement: 2d, The facts in said replication, as therein averred, afford no grounds for sustaining the plaintiff's writ and

Digitized by Google

declaration; and 3d, that such replication was in other respects insufficient in substance and form.

Second. That the justice further erred in that, on overruling said demurrer, the judgment should have been that the defendants answer over, and not a final judgment against defendants.

Third. That the said justice further erred in not sustaining the said demurrer of said defendants; that the facts alleged in said plea in abatement might have been inquired into by the court, and, if found to be true, that the said writ might have been quashed.

Fourth. That the said justice further erred in giving judgment for the sum of $238 78. 1st. The amount sworn to be due, as appears by the affidavit upon which the writ in this case was issued, is but the sum of $219 95, and 2d, The damages alleged in the plaintiff's declaration and therein claimed by him is but $100.

The following is the return of the justice to the writ of certiorari.

State of Michigan, County of Berrien, ss. I, J. W. Brewer, the justice of the peace in the writ hereunto annexed named, do certify to the Circuit Court for said county, that before the coming to me of the said writ, to-wit, on the 26th day of January, 1860, at the request of Peter Yoare, in the said writ named, I issued a writ of attachment, directed to any constable of the said county, commanding him to attach so much of the goods and chattels of Theodore Pew and Franklin Pew, under the name and firm of T. & F. Pew, as would be sufficient to satisfy said demand, and safely to keep the same to satisfy any judgment that may be recovered by the said Peter Yoare, in the said writ named; which writ was returnable on the 4th day of February, 1860, at my office in the township of St. Joseph, at ten o'clock in the forenoon; which attachment, on or before the return day thereof, was delivered to me by A. J. Barhight, a constable of the

Digitized by Google

said county, with a return thereon signed by him, served the 26th day of January, 1860, by seizing one one-horse buggy with top or cover, one new one-horse cutter, one pile driver and hammer, one big line, the property of the defendants T. & F. Pew, and on the same day served upon the defendants personally a copy of the attachment, and of the inventory duly certified by him.

And I do further certify that, at the time and place specified for the return of the said attachment, the said parties appeared before me, and the said plaintiff, by Horace Guernsey, his attorney, declared orally against the defendants as follows: "On two promissory notes, and one due bill, produced and filed in court, which read as follows, to-wit:

$51 01 St. Joseph, October 12th, 1859.

Sixty days after date we promise to pay, to the order of Peter Yoare, fifty-one and 01-100 dollars value received.

T. & F. PEW.

$51 02 St. Joseph, October 12th, 1859.

Thirty days after date we promise to pay to the order of Peter Yoare fifty-one and 2-100 dollars, value received.

T. & F. PEW.

$173 19 St. Joseph, October 17th, 1859.

Due Peter Yoare one hundred and seventy-three and 19-100 dollars, value received. T. & F. PEW.

Also, for work and labor, care and diligence, done and performed by the plaintiff for the defendants at their request, also for money expended at their request, to the damage of the plaintiff one hundred dollars."

To which defendants filed a plea in abatement to the plaintiff's writ and declaration, which is hereunto annexed, to which plea the plaintiff filed a replication, which is also hereunto annexed, and plaintiff moved to adjourn. I therefore adjourned the suit until the eleventh day of February, 1860, at one o'clock in the afternoon, and on the adjourned day the parties appeared: F. Muzzy for the plaintiff, and

Digitized by Google

amended his said replication by consent of defendants' attorney; D. A. Winslow appeared for the defendants; defendants by their attorney demurred in writing to the amended replication, which demurrer is also hereunto attached. Demurrer overruled.

Plaintiff offered the said notes and due bill in evidence, and thereupon the plaintiff rested his case: the defendants made no defense.

And I also certify that the foregoing is all the testimony given on the said trial, and that after examining the said notes and due bill filed in said cause, and also after hearing the allegations of the plaintiff, defendants making no defense, I, the said justice, did forthwith render judgment, in favor of the plaintiff against the defendants, for $238 78 damages, and also two dollars and twenty cents costs.

And in further answer to the facts set forth in the copy of the affidavit on which the said writ of certiorari was allowed, I do further certify and return, as to the replication, it seems to me that everything was set forth that was necessary; Second, As to the demurrer, I think it was bad, because it did not set forth that both suits were pending at the same time; Third, The plaintiff showed that the former suit commenced by summons was withdrawn on the second day of February, 1860, it being the adjourned day of said suit, and costs taxed to the plaintiff two days before the return day of the attachment; Fourth, Judgment was rendered for the sum of $238 78, because there was no way of ascertaining the defendants' claim against the plaintiff, if any they had; the plaintiff's affidavit by which the writ was issued was for but $219 95, as near as he could estimate the same; so I took the notes for the best evidence, as there was no offset, except that upon the backs of said notes: and as to the damage alleged in the plaintiff's declaration of one hundred dollars, it is very evident that he intended it separate from the notes.

All which I send with the process, pleadings and other

Digitized by Google

things touching the aforesaid proceedings and judgment, as by the said writ I am commanded.

Given under my hand this 26th day of August, 1860.

J. W. BREWER, justice of the peace.

Plea in Abatement.

The said defendants pray judgment of the said writ and declaration in this cause, and that the same may be quashed, because they say that, at the time of the commencement of the suit, another suit was pending for the same cause of action, before J. W. Brewer, Esq., a justice of the peace in and for the township of St. Joseph, in the county of Berrien, and that the parties to such former suit were the same, and identical with the parties to this suit, and none others; and that such former suit so thus pending was commenced by summons on the 19th day of January A. D. 1860, and was made returnable on the 26th day of January aforesaid, at which last mentioned time, the said suit was adjourned to the 2d day of February, 1860, as appears of record; and this the said defendants are ready to verify, &c. Wherefore they pray judgment of the said writ and declaration, and that the same may be quashed.

T. & F. PEW,

By D. A. Winslow, their Att'y.

State of Michigan, county of Berrien, ss. D. A. Winslow, of said county, being duly sworn, deposes and says that he is attorney for said defendants, and knows the facts set forth in the above plea, and that the same is true in substance and matter of fact. D. A. WINSLOW.

Sworn to and subscribed this 4th day of February A. D. 1860, before me.

J. W. BREWER, Justice of the Peace.

Replication.

And the said plaintiff says, that the said summons ought not to be quashed, because he says, that said former suit, in said plea mentioned, was not pending at the time of

Digitized by Google

filing of defendants' plea in this suit, in manner and form as the said defendant hath above, in his said plea in that behalf, alleged, but had been discontinued by plaintiff, and this the said plaintiff prays may be inquired of by the court.

Demurrer.

And the said defendants say, that the replication of the said plaintiff to defendants' plea in abatement is insufficient in law.

The judgment rendered by the Justice on these pleadings, in favor of Yoare, was affirmed by the Circuit Court.

D. A. Winslow, for plaintiffs in error.

F. Muzzy, for defendant in error.

MANNING J.:

The first suit was commenced by summons, the last by suing out an attachment. The plea of the first suit in abatement of the last was therefore bad, in not averring, as it should have done, the pendency of the first suit at the time of putting in of the plea. *Wales v. Jones*, 1 *Mich.* 254, we think conclusive on this point.

There is nothing in the statute regulating proceedings in attachment suits, limiting the plaintiff's recovery to the amount stated and sworn to be due in the affidavit on which the attachment is issued. If a greater amount is shown to be due, we know no reason why the plaintiff should not have judgment for it.

The $100 *ad damnum* was probably intended to cover the common counts only. However that may be, the Circuit Court was right in refusing to reverse the justice's judgment on that account. It in no way affected the merits of the case. The statute requires the Circuit Court to give judgment in the cause as the right of the matter may appear, without regarding technical omissions, imper-

Digitized by Google

fections, or defects in the proceedings before the justice, which did not affect the merits:—*Comp. L.* § 3881.

I think the judgment should be affirmed, with costs.

CAMPBELL J.:

I think the $100 *ad damnum* clause had no reference to the claims specially declared on, and that the declaration was therefore broad enough to support the judgment without the aid of intendment. I concur in affirming it, therefore, on this ground, and because the plea in abatement was insufficient.

MARTIN CH. J. concurred.

Judgment affirmed.

Christopher C. Bennett, Administrator, &c. v. John Nichols and another.

Power of equity to create a lien on lands: remedy at law.—A court of equity can not create a lien on real estate to secure a personal debt not contracted on its credit, and not charged upon it by agreement.

Complainant's intestate had leased premises for the purpose of erecting a steam saw mill thereon, had placed upon them a frame for the building ready for erection, and had contracted and partly paid for an engine for the same. After his death, the land was sold by his lessor, and the purchaser, together with the contractor for the engine, put up the frame, and completed and commenced operating the mill. Complainant, as administrator, filed his bill against them to compel payment of the value of the mill frame, and of the moneys paid towards the engine, and to have the amount declared a lien on the premises. It was held that his claims were not of equitable jurisdiction, and that his remedy was at law.

What not a final decree.—An order overruling a demurrer is not a *final* decree from which an appeal can be taken to the Supreme Court.

What is open to review on appeal from Chancery.—Where a demurrer interposed to a bill in equity is overruled, and the defendant then answers, and the case is heard on pleadings and proofs, and decree rendered against him, an appeal from the final decree opens for review the decision on the demurrer.

Digitized by Google

BENNETT v. NICHOLS.

Defect of jurisdiction not waived by answer.—Where a complainant seeks relief of an equitable character on a case where there is also a legal remedy, and the defendant answers without taking this objection, he may be properly subjected to a decree granting the equitable relief prayed, if it is within the equitable powers of the Court. But where the relief sought is in no sense equitable relief, the objection can not be waived, but may be taken at any stage of the cause.

Heard, October 9th and 10th. Decided, October 27th.

Appeal in Chancery from Branch Circuit.

The nature of the bill is sufficiently stated in the opinion. The defendants severally demurred, but their demurrers were overruled; and they then answered, and the case was heard on pleadings and proofs. The Court below made a decree against Nichols, as prayed, but dismissed the bill as to Grove, without costs. Nichols appealed to this Court.

Gilbert & Thompson, and *Douglass & Andrews*, for complainant.

L. D. Dibble, and *D. D. Hughes*, for defendant Nichols.

T. M. Cooley, for defendant Grove.

CAMPBELL J.:

The bill in this cause was filed to obtain payment of the value of a saw mill frame, and of the sum of $1200 which had been paid by complainant's intestate during his life, towards a steam engine and boiler designed to be put by him in a saw mill to be built on premises leased by him. The lease was made to James K. Bennett, "his executors, administrators and assigns forever," reserving no rent, but conditioned to erect and maintain a saw mill.

The material was mostly prepared by the lessee during his life, and the frame was put up immediately after his death. The engine was contracted for by him with defendant Nichols, and his partner, one Shepard, and was deliverable before Bennett's death; and $1200 had been paid thereon,

Digitized by Google

a balance of about $600 being payable some months afterwards. After Bennett's death, the land was conveyed to Grove by Warner, the lessor, and Grove and Nichols completed the mill, of which Nichols was to and did furnish the engine. It is not entirely clear, nor do we deem it material, whether the engine furnished was the one designed originally for Bennett.

The Court below declared Nichols personally liable for all of complainant's claim, and made a personal decree against him for the amount, and gave a lien on his share of the premises to secure it.

We have not been able to discover upon what principle a court of equity can create a lien on real estate to secure a personal debt, not contracted on its credit, and not charged on it by agreement. There may be cases where, from the nature of the transactions between parties, rights spring up which ought to be held binding on specific property. No case like the one before us has been presented, authorizing such a lien to be declared, and no sound reason has been suggested requiring or permitting it.

We are inclined to think, on the facts as they now appear in proof, that the right existed in the representatives of James K. Bennett to remove the mill frame after his death. Such erections are not so attached to the freehold as to exempt them from the immunity of trade fixtures. And, except to a small amount, the material had not been put up before his death, and so remained entirely in the shape of movable chattels, to which his title was clear. We have no doubt a right of action existed for the conversion of this property, against the wrongful appropriator.

We are also of opinion that a right of action existed against Nichols and Shepard, for any breach of their contract to complete and deliver the engine and boiler.

But these claims, as set up in the bill, and as proved, have no equitable nature. They are proper foundations for suits at law, and for nothing else. The remedy sought

Digitized by Google

in the bill is a legal remedy, and one which, unconnected as it is with any peculiarly equitable features, is beyond the jurisdiction of a court of equity.

It is claimed, however, that the defendants have, by answering on the merits without raising this objection, waived the right to take it. The objection was taken by demurrer, and the demurrer was overruled. An order overruling a demurrer is not a decree, and is not in any sense final; the practice requiring that the defendant answer over. No appeal can be taken from such an order, and the appeal from the final decree opens for review all the merits of the case.

But we think the complainant has also misapprehended the nature of the objection to his bill. Where a complainant seeks relief of an equitable character, on a case where there is also an adequate legal remedy, the party waiving this objection may be properly subjected to a decree granting the equitable relief prayed, if it is within the equitable powers of the Court. The relief sought here is in no sense equitable relief. A bill to collect a promissory note would be precisely like it in principle. Such a jurisdiction should be rejected by the Court itself as not within its legitimate province.

The decree must be reversed, and the bill dismissed, with costs in both Courts, but without prejudice to any legal redress.

The other Justices concurred.

The People on the relation of Amos A. Kinney v. Edward H. C. Wilson, Judge, &c.

Notice of judgment rendered in vacation.—The party against whom a decision is rendered by a Circuit Judge in vacation, is entitled to a written notice, either from the clerk or from the opposite party, before the ten days allowed him for making a case commences to run.

Heard and decided October 31st.

Digitized by Google

THE PEOPLE v. WILSON.

Motion by *C. A. Stacy*, for a mandamus, directed to the Circuit Judge of the first Circuit, to compel him to settle and sign a case. It appeared by the affidavits presented, that the case of the relator against Andrew J. Gaumer, was submitted to the Court upon the facts, and that the Judge, on September 23, 1863 (in vacation), delivered to the clerk his decision in writing, in favor of defendant. On the next day, the defendant's counsel verbally informed the plaintiff's attorney of the decision, which was the only notice he received from any source. On October 4th, the plaintiff's attorney signed a stipulation consenting to the taxation of defendant's costs. Within ten days from that date, plaintiff's attorney prepared a case, and served it upon the attorney for defendant; and due notice was afterwards given for settling the same by the Judge. On appearing before the Judge, the defendant's attorney objected to the settlement, because the case was not prepared and served within ten days after the oral notification of the decision. The Judge, being in doubt as to the proper construction of the rules on the subject, declined to sign the case, that the question might be settled by this Court.

Mr. Stacy argued that under *Comp. L.* § 3441, and rules 81 and 6 of the Circuit Courts, the ten days allowed the party to make a case for review in this Court did not commence running until he had been served with written notice of the entry of the judgment.

A. L. Millerd, contra, referred to *Richardson v. Yawkey*, 9 *Mich.* 139, as settling the rule, that a party who has acted upon knowledge of a judgment can not afterwards insist upon his right to a written notice. In this case, the plaintiff had stipulated for the taxation of the costs, and, in so doing, had of course acted upon the notice received September 24th, since that was the only

Digitized by Google

notice given him. He had thus waived his right to insist that the notice thus received was not sufficient.

MARTIN CH. J.:

Under the statute, the clerk must at least serve notice of the judgment on the successful party; and either that party or the clerk should serve written notice upon the other party, before the ten days will commence running. He is not to be deprived of his rights without written notice from some one.

MANNING J. I think the correct practice is for the clerk to notify the successful party of the decision, and the latter should then serve written notice upon the other party.

CAMPBELL J. If defendant, by stipulating for the taxation of the costs on October 4th, waived his right to insist upon a written notice, the waiver could not relate back of that time.

Mandamus granted.

George C. Evans v. The People.

Omission of matter of form in indictment.—Under the statute of 1855, relative to indictments (*Comp. L.* § 6047 *et seq.*), if an indictment or information contains direct and unequivocal averments of such facts—not being mere evidence—as lead immediately and of necessity to a single and inevitable conclusion, the omission to draw that conclusion will not vitiate the pleading.

An information for murder was in the full common law form of indictments, except that in the conclusion, where it was averred that the respondent "did kill and murder," the name of the person killed was omitted. The respondent was convicted of manslaughter, and it was held that, under the statute, the information was sufficient to sustain the conviction.

Opinion of witnesses who are not experts.—The cases considered in which the opinions of witnesses who are not experts may be given in evidence.

Digitized by Google

EVANS v. THE PEOPLE.

The case being such, that the exact nature, as well as the existence, of a particular epidemic in a certain locality was in controversy, a question was put to a witness (not an expert) as to the existence of the epidemic in that locality. The question was objected to, and the objection overruled. The witness, in reply, denied the existence of any sickness whatever in the locality. It was held that the difference between health and any sickness whatever could not be regarded as open only to medical science, and that the answer of the witness was not incompetent.

Heard October 23rd. Decided November 10th.

Error to Kent Circuit.

The plaintiff in error was informed against for murder, as follows:

"STATE OF MICHIGAN, KENT COUNTY, ss. *The Circuit Court for the County of Kent.* E. G. D. Holden, prosecuting attorney for the county of Kent aforesaid, for and in behalf of The People of the State of Michigan, comes into said Court, in the March term thereof, A. D. 1863, and gives it here to understand and be informed, that George C. Evans, late of the city of Grand Rapids, of the county of Kent, on the eighteenth day of February, eighteen hundred and sixty-three, at the city of Grand Rapids, county aforesaid, in and upon one Coban Balch, in the peace of the People of the State aforesaid then and there being, feloniously, willfully, and of his malice aforethought, did make an assault, and that the said George C. Evans, then and there, feloniously, willfully, and of his malice aforethought, did strike, beat and kick the said Coban Balch, with his hands, fists and feet, in and upon the head, breast, sides and other parts of the body of him, the said Coban Balch, and did then and there feloniously, willfully, and of his malice aforethought, knock the said Coban Balch down, with great force and violence, then giving unto the said Coban Balch, then and there, as well by the beating, striking and kicking of him, the said Coban Balch, in manner and form aforesaid, as by knocking him, the said Coban Balch, down, as aforesaid, several mortal strokes, wounds and bruises, in and upon the head, breast, sides, and other parts of the body of

Digitized by Google

him, the said Coban Balch, of which said mortal strokes, wounds and bruises, he, the said Coban Balch, from the eighteenth day of February, A. D. 1863, until the twentieth day of February, 1863, did languish, and languishing, did live; on which said 20th day of February, in the year aforesaid, the said Coban Balch, at Grand Rapids, in the county and State aforesaid, of the several mortal strokes, wounds and bruises aforesaid, died; and so the Court is informed that George C. Evans, in manner and form aforesaid, feloniously, willfully, and of his malice aforethought, did kill and murder, contrary to the statute in such case made and provided, and against the peace and dignity of the State of Michigan.

E. G. D. HOLDEN,

Prosecuting Attorney for Kent County."

On this information, defendant was convicted of manslaughter, and sentenced to the State prison for two years and six months. The case was removed to this Court for review on writ of error and bill of exceptions. The questions raised by the exceptions sufficiently appear by the opinion.

Ashley & Chipman, *J. T. Holmes* and *G. V. N. Lothrop*, for plaintiff in error:

1. The information purports, in the main, to follow the common law forms for indictments for murder; yet in the conclusion it does not aver that the said George C. Evans did kill and murder the deceased.

Our statute of 1855, Compiled Laws, p. 1587, § 1, provides that, in all indictments for murder, it shall not be necessary to state the manner in which, and the means by which, the death of the deceased was caused; declaring it to be sufficient to charge that the defendant did willfully, and of his malice aforethought, kill and murder the *deceased.*

Since this statute became the law, a statement in an

Digitized by Google

indictment for murder, of the manner in which, or the means by which, the death of the deceased was caused, performs no office, and is surplusage.

The statute of 1859, p. 392, § 4, applies the statute above mentioned, relating to indictments, to informations.

At common law, after stating the manner in which, and the means by which, death was caused, it was necessary to charge that the accused did, with malice, &c., kill and murder the *deceased*. It was not sufficient to charge that the accused did kill and murder. See *Arch. Cr. Pl.* 301, 884; *Dias v. State*, 7 *Black.* 20; 1 *Chit. Cr. L.* 243.

Our statute of 1855 is a recognition of this rule, as applicable to common law indictments. It simply provides, in substance, that the concluding charge of a common law indictment shall be sufficient, and uses almost the identical language of the common law text writers upon that subject.

The court never, in criminal cases, take anything by intendment or implication:—*Long's Case*, 5 *Coke*; 4 *Bl. Com.* 310 *and note;* 1 *Chit. Cr. L.* 230.

2. Upon the question as to the prevalence of erysipelas in the neighborhood of the residence of the deceased, physicians alone were competent to testify.

That was a question of fact, about which both parties offered proof. The question of the materiality of the proof to the issue, was not raised below, and is not in issue here. Clearly, persons skilled in treating diseases, are alone competent to testify upon that point:—*Greenl. Ev.* § 440, *note* 2.

A. Williams, Attorney General, for the People:

1. The information is not defective in the respect alleged—it clearly and distinctly charging the respondent with the crime of *murder*, thereby fully performing the office devolved upon a pleading of this kind.

It is one of the first principles of pleading, that there is only occasion to state the *facts*, for the purpose of inform-

Digitized by Google

ing the Court, whose duty it is to determine the *law* arising upon those facts, and of apprising the opposite party of what is meant to be proved, in order to give an opportunity to answer or traverse:—1 *Chit. Pl.* 213; 1 *Chit. Cr. L.* 172; *Steph. on Pl.* 135.

This object is fully consummated by this information. *A full description of the injury* complained of, embracing every fact necessary for the people to prove, is contained in the information; *the crime*, as the fruit of those facts, is positively and unmistakably charged upon the respondent; and thus he is positively *informed of that which he is to answer.*

True, it is said in the information, "and so the Court is informed that George C. Evans, in manner and form *aforesaid*, feloniously, willfully and of his malice aforethought, did kill and murder," omitting to add the name, "Coban Balch."

We submit, that the word "aforesaid," as used in this part of the information, is sufficient without a repetition of the name of the deceased—the respondent being thus as unmistakably informed without, as with it, as to what he is to meet upon trial. And further: The word "aforesaid" is sufficiently comprehensive in its scope and meaning, to therein repeat, by its use in this clause of the information, for all the purposes of pleading, all that is thus clearly intended to be referred to. This would as necessarily include *the object* of the acts, as the acts themselves, and their results; for the word, "aforesaid," in its intelligent, retrospective relation, clearly and certainly refers to that which has been said or recited before in the information and which makes up the entire body of the offense:—1 *Chit. Pl.* 237-8-9; 1 *Chit. Cr. L.* 454, 172-3; 1 *Comst.* 180-4-5; 12 *Wend.* 425; 8 *Barb.* 550-1, 548; *Niles v. Rhodes*, 7 *Mich.* 374-8-9; *Whart. Cr. L.* § 1073; 1 *Arch. Cr. Pl. p.* 86 *and note* 1, *and p.* 118-2; 3 *Dyer*, 304; 3 *Park. Cr. R.* 15 *to* 21.

Digitized by Google

If the case made by the information be clear, nice distinctions ought not to be regarded:—1 *Chit. Pl.* 238; 13 *Johns.* 482; 1 *Chit. Cr. L.* 172-3.

After verdict an expression must be construed in such a sense as will sustain the verdict:—1 *Chit. Pl.* 238.

2. The respondent was convicted of manslaughter; and, as an information for manslaughter, it is sufficient—*no word of art being necessary to describe or charge this offense:*—*Whart. Cr. L.* §§ 399, 400; *Arch. Cr. Pl. p.* 91, 92, *and note* 1; *Dias v. The State*, 7 *Blackf.* 20; 3 *Dyer*, 304; 3 *Park. Cr. R.* 20.

3. The respondent's objection relates to *the form*, and not the substance of the information:—5 *Wend.* 10; 12 *Wend.* 425; 3 *Denio*, 212; 8 *Barb.* 550-51, 548; *Whart. Cr. L.* § 427; 1 *Arch. Cr. Pl.* 118-2, *note* 2.

The objection being to *the form* of the information, *apparent upon its face*, it must have been taken by demurrer, or motion to quash the same, before the jury were sworn, and not after:—2 *Comp. L.* § 6055; 10 *Mich.* 372, 395.

4. No injury could have resulted to the respondent from allowing Hendershot to answer the question put to him. The witness residing near the deceased in his life time, could testify whether or not there was sickness, but perhaps not, there being sickness, as to the type of it—a point, however, not conceded.

CAMPBELL J.:

Evans, the plaintiff in error, was convicted of manslaughter in killing one Coban Balch. Error is brought on two grounds: *First.* That the information is insufficient to sustain the conviction; and *Second.* That evidence was received which was inadmissible.

The error alleged in the information is, that while, in the concluding portion, it is averred that Evans did "kill and murder," it does not there show the name of the

Digitized by Google

person killed, and so contains no charge of the slaying of Balch. With this exception, the information is in the full form of a common law indictment for murder, and recites and alleges distinctly an assault, the infliction of mortal wounds, and that Balch died of those wounds; and in this part of the pleading the averments are full and technical as to time, place, manner, and all other matters essential. It is quite probable that if this information could only be sustained according to the rules of the common law, it would not come up to the certainty required. It is not to be denied that, in indictments for homicide, great strictness is required in alleging distinctly every necessary inference and conclusion. But our statute of 1855 declares, that "no indictment for any offense shall be held insufficient for want of the averment of any matter unnecessary to be proved," "nor for a want of a proper and formal conclusion: — 2 *Comp. L.* § 6054. We think that these, and other provisions in that statute concerning matters of form, require us to hold that, if an indictment or information contains direct and unequivocal averments of such facts (not being mere evidence) as lead immediately and of necessity to a single and inevitable conclusion, the omission to draw that conclusion expressly will not vitiate the pleading. The allegations in the case before us can not, by any possible construction, permit any inference except that Evans feloniously and maliciously killed Balch, at the time and in the manner specified. Had the jury found him guilty of "*murder*," the question might arise which was referred to on the argument, whether that offense could be described without the technical word. In manslaughter, any unlawful and felonious killing constitutes the offense. We think the information sufficient to sustain the conviction.

The remaining ground of error alleged is, that one John Hendershot, not being shown to possess any special qualifications, was allowed to answer a question involving an

Digitized by Google

inquiry of medical science, having an important bearing upon the cause of Balch's death. It had been shown that he died of erysipelas, claimed by the prosecution to have resulted from the injuries inflicted by Evans. The defense had introduced medical witnesses, whose evidence tended to prove the existence of that disease in an epidemic form in Balch's neighborhood, previous to his visit to Grand Rapids, where he died two days after the assault upon him. Hendershot was called as a rebutting witness, and was asked, under objection, whether there was "any case of erysipelas about the neighborhood of the residence of the deceased, before his coming to Grand Rapids, in February last;" the witness answered, "No, sir; neither before nor since; no sickness within five or six miles of Coban Balch's residence during the month of February, nor until after that time."

There can be no doubt of the importance of these various inquiries, inasmuch as they were aimed at explaining the causes of the death of Balch, and showing how far Evans was responsible for it. It becomes essential, therefore, to consider whether this question was admissible under the circumstances, and also how far the form of the answer may affect the legality of its reception.

If the question was improper, it is because it is supposed to involve obtaining an opinion which no one has a right to give in evidence without an especial knowledge of diseases in general, or of the particular disease named, not supposed to be possessed except by those whose study or attention has been turned in that direction.

It is not always easy to determine the propriety of receiving or rejecting testimony concerning matters involving, apparently, to a greater or less extent, medical or other scientific investigation. There are many cases where it is difficult to determine whether the facts to be examined are to be considered beyond the range of ordinary intelligence. And the decisions are by no means clear or

Digitized by Google

satisfactory upon the distinctions. The principles on which the authorities rest are more consistent than the attempts to apply them.

The primary rule, concerning all evidence, is, that personal knowledge of such facts as a court or jury may be called upon to consider, should be required of all witnesses, where it is attainable. It is also an elementary rule that, where the court or jury can make their own deductions, they shall not be made by those testifying. In all cases, therefore, where it is possible to inform the jury fully enough to enable them to dispense with the opinions or deductions of witnesses from things noticed by themselves, or described by others, such opinions or deductions should not usually be received. But experience has shown that many cases exist, in which it is impossible, by any description, however graphic, to explain things so as to enable any one but the witness himself to see or comprehend them, as they would have been seen or comprehended could the jury have occupied his position of observation. In such cases, the witness must give his own impressions and conclusions, or his narrative is useless; adding, however, as full explanations as the nature of the case will admit, so that his capacity and truthfulness may be tested as far as practicable. Examples of this kind frequently occur, when it becomes necessary to inquire into mental condition and disposition, into the existence of passion or emotion, attention or inattention, vigor or weakness, affection or aversion, or any other matter in which we usually form our opinions without stopping to analyse the reasons for them, or notice their elements. Similar instances occur where witnesses attempt to describe natural phenomena, as degrees of light and darkness, the measurement of distances by the eye, changes of heat and cold, and the like. The principle which allows persons who understand matters of science or skill to give their opinions and deductions from facts exhibited or described to them, rests upon the same foundation. In all these cases, the

Digitized by Google

witness is allowed to testify to a result, because, without such evidence, the jury can not be supposed able to arrive at a knowledge of it, and therefore such aid is indispensible. And it also follows, that no witness can be permitted to offer such testimony, unless he appears to be qualified, in some degree, at least, to furnish the means of aiding the jury in arriving at a true result. The greatest difficulty encountered in determining questions of competency of testimony, on subjects connected more or less with medical science, is in ascertaining how far it is safe to suppose unprofessional observers are able to form a reliable judgment. There are some simple disorders, which all persons are familiar with. Others require the very highest degree of medical skill to distinguish them from disorders having some resembling appearances or symptoms. In some cases, too, although inquiries arise concerning the existence of health or disease, it does not become important to have accurate information as to the precise character of such disorders as may exist. In the view of evidence now entertained by the best authorities, it is settled that a jury should be allowed to have placed before them all the means of knowledge which can be had without involving the danger of leading them to form conclusions not based on solid truth, and not reliable as reasonably certain. If a witness is competent to form an opinion which the jury could not, or which an ordinary witness could not, it would be absurd to reject his aid. But, on the other hand, a scientific witness, when he testifies to matters within the comprehension of ordinary witnesses, stands on the same footing with them as to all such testimony, and as to those matters can only give his opinions where any other observer might.

Thus, when it was held by some authorities that, upon questions touching the mental capacity of a particular person, only physicians and subscribing witnesses could give their opinion, the inquiry was not made one of science

Digitized by Google

merely, and the scientific expert was put on the same footing, on questions not purely medical, with ordinary witnesses having no scientific knowledge, and whose powers of observation were those possessed by any one in like circumstances; and the recognition of this equality has led to the modern sensible doctrine, that similar opinions are receivable from all who have, by personal observation, had means of forming a judgment concerning the condition of the party. The value of any such opinion depends, like all other testimony, on the honesty and sagacity of the witness, and on his means of observing and judging.

Such opinions being constantly formed and acted upon by all men in their daily intercourse, are among the most familiar means of safety in business transactions. But there may be, in addition to appearances which all intelligent men understand, peculiar symptoms and conditions understood only by medical men or other experts; and as to these peculiarities, the testimony of such experts becomes admissible beyond that of others.

What is thus true of mental capacity may become equally true in regard to other matters involving some questions of skill. Circumstances may make whole communities familiar with diseases not generally known elsewhere, and reasonably competent to manage ordinary cases of such diseases, and to recognize their symptoms. Such is often the case from necessity in new countries; and the same necessity leads to a more general knowledge of the extent to which a neighborhood has suffered from any prevailing sickness than is usual in populous towns. And it often happens that some persons having no general skill become very familiar with particular subjects.

It would be very unwise to exclude such evidence, merely because the range of the witness's knowledge is limited. There are as many grades of knowledge and ignorance in the professions as out of them. The only safe rule in any of these cases is, to ascertain the extent

Digitized by Google

of the witness's qualifications, and, within their range, to permit him to speak. Cross-examination, and the testimony of others, will here, as in all other cases, furnish the best means of testing his value.

The circumstances of the case, therefore, must be looked at to determine the admissibility, not only of the question put to Hendershot, but also of his answer. As he was not examined concerning his knowledge of erysipelas, or of diseases generally, he could not be asked such a question, if the issue materially required from the witness any such knowledge. The inquiry before the jury was whether the erysipelas, of which Balch died, was dependent on a wound, or was wholly or in part derived from other causes. It was attributed by the defense to his previous exposure to an epidemic.

The exact nature, as well as the existence of such epidemic was thus directly in controversy. This question, therefore, could not properly be put to any one not having some knowledge of the disease; and, as the record stands, was erroneously allowed.

But Hendershot's answer, denying the existence of any disease whatever in that vicinity, stands on a different footing. The difference between health and any sickness whatever can hardly be regarded as open only to medical knowledge; and his contradiction of the medical testimony is a contradiction of common facts, and not of science. The value of such a sweeping assertion is not to be determined in this Court.

The testimony was not incompetent. There was no error in the proceedings, and the judgment must be affirmed.

The other Justices concurred.

Digitized by Google

Township of Texas v. Henry Wager.

Compensation of Collector of Taxes. Under the statutes in force in 1861 and 1862, (*Comp. L.* §§ 815, 841; *Laws of* 1858, *p.* 182), the township treasurer had the right to retain, of his own authority, only two per cent. of the taxes of 1861 collected by him, for his fees, where neither the electors of the township, nor the supervisor, had fixed his compensation at a higher rate.

Whether the supervisor has the right to fix the compensation when the electors have neglected to do so, *quere.*

Where the electors did not determine what percentage should be added to the taxes for the collection expenses, and the supervisor added two and a half per cent., and in his warrant for their collection, directed the treasurer to retain that amount for his fees, and the treasurer retained *four* per cent., paying over the remainder; it was held, that he was liable to the township for the amount which he had retained over two and a half per cent.

Heard October 23d. Decided November 10th.

Case made after judgment, from Kalamazoo Circuit.

The cause was submitted to the Court below upon a stipulation showing the following facts:

The defendant was township treasurer of Texas, from April, 1861, to April, 1862, during which period he collected for the township, and was entitled to his legal per centage upon $2,448 20. This sum included two and a half per cent. added by the supervisor for collection expenses.

The electors of the township, neither at the annual meeting nor at any other time, determined by vote what per cent should be added by the supervisor for collection expenses.

The supervisor, in the warrant issued by him to the defendant for the collection of the taxes, directed the defendant to retain two and a half per cent of the amount for his fees, and to pay over the remainder. The defendant, however, in his settlement with the township board, retained *four* per cent, and paid over the remainder. Four per cent had been received by the township treasurer for his fees for each of the ten preceding years, except two years, when the rate was fixed by the electors at two and a half per cent.

Digitized by Google

The township claimed to recover in this suit, the one and a half per cent retained by the defendant, above the sum so fixed by the supervisor; and the Circuit Court gave judgment therefor.

C. S. May & Briggs, for plaintiff.

T. R. Sherwood and *C. E. Stuart*, for defendant.

CHRISTIANCY J.:

The only question here presented is, whether, by the statutes in force in the years 1861 and 1862, the township treasurer collecting the tax of 1861 had a right to retain four per cent for collection, when the electors, at the township meeting, had neglected to fix the amount, and the supervisor had added but two and a half per cent to the roll for that purpose, and, in his warrant, authorized him to retain only the latter amount.

By the act of 1853, § 33 (*Comp. L.* § 815), the supervisor is required to assess the amount of taxes for state, county and township purposes, "adding thereto and to all other taxes required by law to be assessed by him, not more than four nor less than two per cent for collection expenses, upon the taxable property of the township," &c.

No tribunal or mode is provided by this statute for fixing the percentage for collection between the extremes of two and four per cent: under this statute, therefore, the supervisor alone, we think, had the power to fix the amount between these limits.

But by the amendment of 1858 (*Laws of* 1858, *p.* 182), which applies to the present case, after the words, "not more than four, nor less than two per cent," the following words are inserted: "as shall be determined by the electors at their annual meeting, at the same time and in the same manner that overseers of highways are elected."

By section fifty-nine of the act of 1853 (*Comp. L.* § 841), which was not amended by the act of 1858, "the town-

Digitized by Google

ship treasurer shall receive not to exceed four, nor less than two per cent on the amount collected, which he shall retain out of the moneys collected by him." This provision must be construed with reference to, and as dependent upon, section thirty-three; and, since the amendment, as dependent upon the last named section as amended. Whether, after the amendment of 1858, the supervisor had the power to fix upon any rate of percentage between the two and the four per cent, is a question not raised by the case, and we give no opinion upon it. But, granting that he had that power, we think it clear, that if he had not fixed it at a higher rate, the treasurer could not, of his own authority, retain a higher rate than two per cent. Under the amendment of 1858, the treasurer had a legal right, by the direct authority of the statute itself, to the two per cent; and, except as increased by the supervisor (if he has the authority) or by the electors, to nothing more.

The vote of the electors could alone give him the right to a higher rate of compensation than that fixed by the supervisor, and by him added to the taxes.

The judgment of the Circuit Court was, we think, correct, and it must be affirmed, with costs.

The other Justices concurred.

Charles M. Welch v. A. Smith Bagg.

Evidence not to be weighed on certiorari.—Where there is a conflict of evidence on a trial before a justice, and still evidence has been put in which covers the whole case, so far that, if believed, it would warrant a verdict, the Circuit Court, on certiorari, has no power to weigh the evidence, but must respect the finding, whether it is or is not such as would have been made by that Court. (*Berry v. Lowe*, 10 *Mich.* 9).

Digitized by Google

WELCH v. BAGG.

Assignment of error.—In an affidavit for a certiorari, an allegation of error, that there was no evidence to sustain the verdict and judgment, is too general and uncertain to be noticed. Per MANNING J., MARTIN CH. J. concurring.

Waiver of tort.—A plaintiff may recover on a declaration for pasturing cows, on proof showing that his land was used by the defendant for that purpose. If the use was without the plaintiff's consent, defendant was a trespasser, and plaintiff might either sue him in trespass, or waive the trespass and sue in assumpsit. Per MANNING J., MARTIN CH. J. concurring.

Heard October 15th. Decided November 10th.

Error to Wayne Circuit.

Suit was brought by Welch against Bagg before a justice, where he declared in assumpsit, "for pasturing cows by the plaintiff, for the defendant, in the Detroit Riding Park, so called, in the year 1862; and upon the common counts." Defendant pleaded the general issue, with notice of special defense. The cause was tried by a jury, who rendered a verdict for plaintiff. Defendant removed the cause by certiorari to the Wayne Circuit Court, assigning in his affidavit for the writ, the following grounds of error:

First. That there was no evidence to sustain said verdict and judgment.

Second. That there was no evidence showing any lease to, or right of defendant to pasture his cows on said premises.

Third. There was no evidence to sustain the relation of landlord and tenant between the parties.

Lastly. The court refused to charge the jury, as requested by defendant.

All the evidence given on the trial before the justice was incorporated in his return to the writ of certiorari, but it is not deemed important to give it here. The Circuit Court reversed the judgment of the justice, and Welch brought error.

H. M. Cheever, for plaintiff in error.

D. C. Holbrook, for defendant in error.

Digitized by Google

WELCH v. BAGG.

MANNING J.:

Welch obtained a judgment against Bagg in a justice's court. Bagg removed the cause by certiorari to the Circuit Court, where the judgment was reversed, and thereupon the plaintiff sued out a writ of error from this Court.

The affidavit for a certiorari to a justice's court, must state "the grounds upon which an allegation of error is founded:"—*Comp. L.* § 3869. In other words, it must state in what the error of the justice in rendering the judgment consists, that the officer in allowing the writ, and the court afterwards in deciding the cause, may not be required to look through the whole case to see if there is not something on which it may be reversed. It is to be heard in the Circuit Court "without any assignment or joinder in error, unless there be an allegation of error in fact:"—*Comp. L.* § 3880. The errors complained of in the affidavit are the assignment of errors. In the present case they are as follows:

First. That there was no evidence to sustain said verdict and judgment.

Second. That there was no evidence showing any lease to, or right of defendant to pasture his cows on said premises.

Third. There was no evidence to sustain the relation of landlord and tenant between the parties. There was a fourth, but that was abandoned on the argument.

The first ground of error is too general and uncertain to challenge the attention of the Court. It does not state a total want of evidence to prove some fact necessary to establish the plaintiff's cause of action. When the objection is want of evidence, the particular fact of which there was no evidence before the justice, should be stated in the affidavit. If there was evidence before the justice to prove every fact necessary to sustain the judgment, the Circuit Court can not reverse it, however much it may

Digitized by Google

be dissatisfied with the conclusion of the justice or jury. It can not weigh the evidence as a whole, or on any particular fact to be proved. All it can do is to inquire whether there was a total want of evidence before the justice to prove some fact that should have been proved to sustain the action, and to reverse the judgment for the want of such evidence:—*Berry v. Lowe*, 10 *Mich.* 9.

The second and third grounds of error are good in form but bad in substance.

It was not necessary to prove them to sustain the action. The plaintiff declared orally in assumpsit, for pasturing defendant's cows. To sustain his action it was not necessary to prove a lease to defendant, or the relation of landlord and tenant. Such facts, instead of proving, would have disproved the plaintiff's action. If defendant had a lease from plaintiff, he might be sued for the rent, but not for pasturing his cattle on leasehold premises. As to defendant's having no right to pasture his cows on plaintiff's land, which is one of the alleged grounds of error; if it were so, the evidence shows he used the plaintiff's land for that purpose, and if he did it without plaintiff's consent, he was a trespasser, and plaintiff might sue him in trespass, or waive the trespass and sue him in assumpsit, as he has done, for pasturing his cattle.

The judgment of the Circuit Court, reversing the justice's judgment, I think should be reversed, and the justice's judgment affirmed, with costs in this and the Circuit Court.

MARTIN CH. J. concurred.

CAMPBELL J.:

Plaintiff sued defendant before a justice, for the price of pasturing certain cows; and obtained judgment.

The Circuit Court reversed this judgment on certiorari, for want of proof.

The errors assigned by the affidavit for certiorari were, that there was no evidence to support the judgment, and

Digitized by Google

two specific allegations that there was no evidence showing any lease to or right of defendant to pasture his cows on the premises, and none to sustain the relation of landlord and tenant. It was held by this Court in *Berry v. Lowe*, 10 *Mich.* 9, that the Circuit Court could not reverse the judgment of a justice on the evidence, unless no proof could be found in the case which, if believed, would maintain it. If there is a conflict of testimony, and still evidence has been put in which covers the whole case, so far that, if believed, it would warrant a verdict, the Court above must respect the finding, whether it is, or not, such as would have been made by the appellate court if it had power to weigh the evidence. This rule has not been observed in the case before us. There is evidence tending to show that both parties regarded the cattle as rightfully put in the plaintiff's pasture, and that it was expected on both sides that the plaintiff would be paid for the pasturage.

The evidence was pertinent, and satisfied the jury. Their finding could not lawfully be disturbed.

The judgment of the Circuit Court should be reversed, and the justice's judgment should be affirmed, with costs of all the courts.

CHRISTIANCY J. concurred in this opinion.

Judgment reversed.

The Detroit and Milwaukee Railroad Company v. Stephen Griggs and others.

Former suit when not a bar.—Bill to foreclose a mortgage given for the purchase price of lands, which were conveyed to the mortgagor by deed covenanting against incumbrances. The mortgagor defended, claiming to have the amount of two mortgages, which were liens on the premises when conveyed to him, but which he had not yet paid, deducted. The deduction not being allowed, the mortgagor, after decree, paid off the prior mortgages, and then filed his bill to have the sums so paid set off and deducted from the amount of the decree. It was held, that the bill might be maintained, and that the adjudication in the first suit was not a bar to it.

Digitized by Google

DETROIT AND MILWAUKEE RAILROAD CO. v. GRIGGS.

Covenant against incumbrances: Election of remedies.—The purchaser in such case is not confined to his remedy upon the covenant, but is entitled, especially when the covenantor is insolvent, to have existing incumbrances deducted from his mortgage.

Heard October 27th and 28th. Decided November 10th.

Appeal in chancery from Wayne Circuit.

The complainants, by leave of the Court, filed their bill of complaint, setting forth:

That on May 23, 1854, the Detroit and Pontiac Railroad Company purchased lots eleven, twelve and thirteen, according to the recorded plat of the Lambert Beaubien farm, of Thomas Firby, for $17,000, and received therefor a deed with covenants against incumbrances and of title; that they paid Firby $1,000 down, and gave him a mortgage for $16,000, the balance of the purchase price, with interest at ten per cent; that the company then supposed the premises purchased were unincumbered, and relied upon Firby's representations that they were so; that subsequently the Detroit and Pontiac Railroad Company was, by due authority of law, consolidated with the Oakland and Ottowa Railroad Company, under the name of the Detroit and Milwaukee Railway Company, whereby said last company became entitled, among other things, to the said premises:

That Firby assigned said bond and mortgage to Caleb and Albert Ives, by an instrument absolute on its face, but really intended as collateral security for a sum of money he was then owing them, and afterwards, subject to their rights, assigned the same to Stephen Griggs, also as security, for a debt owing to him:

That on August 9, 1859, said Griggs filed his bill in said Court against the Detroit and Milwaukee Railway Company, Thomas Firby, Caleb and Albert Ives, John M. Forbes, John W. Brooks, Charles J. Brydges, Thomas Reynolds, Henry C. R. Beecher, John Owen, James V. Campbell, George F. Porter, Jared C. Warner, Frederick C. Gebhard, Erastus Corning and Matilda Firby (all of whom are also made parties to this bill), in which bill, after setting forth

Digitized by Google

the facts above recited, it was stated that, on March 24, 1858, said Caleb and Albert Ives filed their bill in said court against said Railway Company, and Brooks, Forbes and Griggs, to foreclose said mortgage, and decree was entered thereon February 8, 1859, by which it was adjudged that there was due and unpaid on the bond and mortgage $10,454 64, of which $6,808 01 was to be paid to C. & A. Ives, and $3,200 33 to said Griggs, with interest from January 10, 1859; and said decree also contained the usual order for the sale of the mortgaged premises; said bill also alleged that the Railway Company had made mortgages on said premises to Brydges, Reynolds and Beecher as trustees, and that they, after such decree, had in some way paid said C. & A. Ives for their interest in said bond and mortgage, and taken an assignment thereof, and that they did not now intend to proceed under the decree, and they denied the right of Griggs to do so; and it prayed that said decree might be declared in full force and effect, and be executed, or that a decree of foreclosure should be granted in the usual form; and it also prayed that Griggs might be subrogated to the rights of C. & A. Ives in a collateral mortgage executed to them by Firby to secure the same debt:

That answers were filed by a portion of the defendants to said Griggs bill; the answer of the Detroit and Milwaukee Railway Company, Brydges, Reynolds, Beecher, Owen, Campbell and Porter, admitting the facts set forth in the bill, save that it stated that the transfer of the Ives interest was to Brydges and Reynolds alone; and setting up as a defense that, when the Detroit and Pontiac Railroad Company purchased the premises of Firby, lot thirteen was subject to a mortgage executed to one Penny, for $2500 and interest, which was foreclosed, and the premises sold to Brydges and Reynolds for $1,750 or thereabouts; and that lots eleven and twelve were, as appeared of record, subject to a mortgage for $4000 and

Digitized by Google

interest, executed to one Wilder; that Firby was insolvent; and the answer claimed that the amount of these two mortgages should be deducted from the amount due on the Railroad Company's mortgage to Firby:

That decree was made on said Griggs bill, March 18, 1862, for a sale of the premises to satisfy the amount due on the Railroad Company's mortgage to Firby, not deducting therefrom the amount of the Penny and Wilder mortgages; and this decree was afterwards affirmed by the Supreme Court. [See 10 *Mich.* 117.]

The present bill further sets forth, that the present complainants, the Detroit and Milwaukee Railroad Company, have become the successors and entitled to all the rights of the said Detroit and Milwaukee Railway Company; that after decree in the Griggs suit, Brydges and Reynolds demanded of the Railroad Company possession of lot thirteen as purchasers thereof under the Penny mortgage, and that the company was compelled to and did, on June 28, 1862, purchase the same, and receive a conveyance from said Brydges and Reynolds, for $1,961 80; that George Jerome, who had become owner of the Wilder mortgage, also demanded payment of that, and on June 28, 1862, the company paid him $3,000, and took a discharge thereof.

And the bill therefore prays, that the decree in the Griggs suit should be reviewed and reversed, or that its execution should be enjoined, and a new decree entered, by which the amounts so paid by the company to release the premises from the Penny and Wilder mortgages should be allowed, and deducted from the amount due on the Railway Company's mortgage to Firby.

To this bill, Griggs demurred generally, and the Court below sustained the demurrer.

D. C. Holbrook, for defendant Griggs:

The law of equity is, that where a party has it in his power to make a defense, it must be made; nothing but

Digitized by Google

the want of knowledge of the defense, or new evidence, will allow any bill to be filed to review a decision.

In this case there is stated in the bill such facts as the *law declares* full notice and knowledge of the defense. The *bill* in *this* case *admits that before* Griggs filed his bill, the complainant, as an *actual fact*, had knowledge of those incumbrances outstanding. These matters would defeat a bill of review.

The only bill mentioned in the books allowed after a decree to affect its merits, is a bill of review; and a bill of review can only be filed to correct errors apparent in the pleadings and decree, or for new facts or evidence not known, and which *could not by diligence* be discovered *before* the decree was entered.

The following references show that this bill cannot be sustained: — *Adams Eq.* 397 *note* 2; *Story Eq. Pl.* §§ 412, 413, 414, 415; *Welford Eq. Pl.* 239; *Cooper Eq.* 91, 92; *Mitford*, 6 *Amer. ed.*, *note* 2 *pp.* 101, 102; 16 *Ves.* 348; 6 *Madd.* 127; 5 *Whart.* 26; 7 *W. & S.* 454.

If the payment of those mortgages constituted any defense to reduce the amount due Firby, then it was the duty of the railroad company to have paid them, and set the fact up in its answer. The law authorized the company to pay these mortgages as well before as after the decree. And now the company asks to be relieved from its own neglect, and that the Court shall set aside and change its records and adjudications, as the pecuniary convenience of the company may fluctuate:—15 *Ohio*, 317; *Story Eq. Pl.* § 414; 1 *Dana*, 303; 2 *Dana*, 276; 1 *Met. Ky.* 226; *Saxton*, 413.

Gray & O'Flynn and *H. H. Emmons*, for complainant, cited the following authorities:

1. That the proper remedy has been adopted: — *Story Eq. Pl.* §§ 404, 415, 416, 388, 428; 2 *Barb. Ch. Pr.* 93, 94; 17 *Ves.* 178; 5 *Mason*, 313; 1 *Head*, 484; 4 *J. J.*

Digitized by Google

Marsh. 500; *Story Eq. Juris.* 887; 2 *Hill, Ch.* 152; 15 *Mass.* 207; 15 *Barb.* 515; 4 *Johns.* 191; 1 *Cow.* 42; 4 *Duer,* 148; 3 *Comst.* 216; 18 *How.* 421.

2. That the purchasing of the outstanding title and payment of the mortgage, without waiting for actual eviction, entitle the complainant to have the amount deducted from the bond and mortgage given by Firby: — 13 *Johns.* 105; 2 *Wend.* 405; 7 *Johns.* 358; 4 *Mass.* 627; 16 *Johns.* 254; *Ibid.* 122; 17 *Wend.* 188; 20 *Pick.* 474; 9 *A. & E.* 809; 8 *M. & W.* 829, *and n.* 833; 11 *A. & E.* 315; 2 *Allen,* 111; 5 *Blackf.* 102; 1 *Ind.* 187, 201; 6 *Barb.* 165; 3 *Zab.* 271; 21 *N. Y.* 191.

3. That the former decree is not a bar to the present suit: — 3 *B. Monr.* 39; 9 *Paige,* 445; 6 *Wend.* 284; 3 *Sandf. Ch.* 117; 29 *Barb.* 243; 9 *S. & R.* 524; 1 *Yerg.* 457, 470; 8 *Pick.* 113; 17 *Mass.* 590; 4 *Mass.* 352; 4 *T. R.* 617; 10 *Me.* 170; 12 *Mass.* 304; 36 *Me.* 455; 26 *Miss.* 599; 13 *S. & M.* 445; 8 *Pick.* 550; 8 *Johns.* 442.

MANNING J.:

It is insisted that the relief sought by the present bill should have been made a defense in the case of *Griggs v. The Detroit and Milwaukee Railway Company, and others,* reported in 10 *Mich.* 117. The Penny and Wilder mortgages had not then been paid by complainant. Had they been paid at that time by complainant, the objection would be conclusive. Complainant insisted in its answer to that suit, that it was entitled to have the amount of these mortgages deducted from its mortgage to Firby, without having first paid them.

That was the defense made in that suit. The Court decided otherwise, and a decree was entered for the full amount due on its mortgage to Firby. The present bill, after setting forth the proceedings had in the former suit, states the subsequent payment by complainant of the mortgages, and asks to have the amount so paid deducted from the decree in the former suit.

Digitized by Google

The relief sought is in the nature of an equitable set off.

To a correct understanding of the present controversy, it is only necessary to state, that the Firby mortgage assigned to Griggs, was one given by the Detroit and Pontiac Railroad Company, now the Detroit and Milwaukee Railroad Company, to secure the purchase money of the mortgaged premises, on the conveyance thereof by Firby to the railroad company by a warranty deed, with a covenant against incumbrances. Griggs's rights are Firby's rights, no more, no less. He stands in Firby's shoes. And he insists the present bill can not be maintained, because it was complainant's duty, after having put in its answer in the former suit, to have filed a bill against the holders of the Penny and Wilder mortgages, making Griggs a party, in the nature of an original and cross bill, to have the first mortgage moneys due and payable on the Firby mortgage, applied in payment of the Penny and Wilder mortgages. Such a bill, we think, might have been maintained. We see no reason why it should not. But could not the same thing have been accomplished by Griggs, had he amended his bill, stating these outstanding mortgages, and making the holders thereof parties, and asking to have them paid from what was due on the Firby mortgage? We think it might. If correct in this, the company was no more in fault in not filing a bill to accomplish the object, than Griggs was in not amending his bill to effect the same thing. If either was under a greater obligation than the other, it was Griggs. It was for him, as the representative of Firby, to remove the alleged stumbling block that stood in the way to the payment of the Firby mortgage. If he is delayed in reaping the fruits of his suit by the present bill, is not the fault his own—one that he, as well as the company, might have obviated had the proper steps been taken by either pending the first suit?

It was Firby's duty to pay these mortgages, not the company's. He failing or omitting to do it, the company

Digitized by Google

had a right to pay them and set off the amount against what it was owing on its own mortgage.

The question of payment was not before us in the former suit. The question, as already stated, was whether the company could set off these prior mortgages without paying them. We decided it could not. It has since paid them, and thereby acquired a right that did not exist pending the first suit. And having the right now, it may file a bill to enforce it as it has done in the present case. Complainant might sue Firby on his covenant against incumbrances; but it is not confined to that remedy. It may file a bill to indemnify itself out of the purchase money it is still owing; more especially when the covenantor, as the bill alleges, is insolvent, and the remedy at law would be inadequate. The decree of the Circuit Court is reversed, with costs, and the demurrer of defendant is overruled, with leave to be given in the Circuit Court to defendant to answer, on paying the costs in that Court of overruling the demurrer.

MARTIN CH. J. and CHRISTIANCY J. concurred.

CAMPBELL J. did not sit in the case.

Robert Carter v. Henry Hobbs.

Liability of an innkeeper: What is a "guest."—In order to make one liable as inn-keeper at the common law, for goods lost at his inn, it must appear that he was acting in the capacity of inn-keeper on the occasion when the goods were received, and that the owner was his guest: in other words, that the latter visited the inn for purposes which the common law recognizes as the purposes for which inns are kept.

A ball was given by a fire company at the inn of defendant, the defendant furnishing dancing room, supper, and dressing room, and being paid therefor by the company, at the rate of one dollar for each supper ticket. The ball tickets were sold by the fire company, at two dollars each, and these were taken up at the door of the dancing room, by a person employed by the fire company, and supper tickets given in their stead. The plaintiff, who was a guest at another inn of the town, went to the ball, purchased a ticket therefor

Digitized by Google

at the baggage room, delivered his overcoat, fur collar and gloves, at the office of the hotel, to the clerk, and registered his name, and remained at the ball until it broke up in the morning, when, on calling for his overcoat, collar and gloves, [they could not be found. During the night, the plaintiff had spent some money, for liquors and cigars, at a saloon kept by the defendant in connection with the hotel. It was held that these facts did not show the relation of inn-keeper and guest to exist between the defendant and the plaintiff; that the former did not receive the goods in his capacity as inn-keeper, but merely as an ordinary bailee.

Heard October 16th. Decided November 10th.

Case made after judgment, from Saginaw Circuit.

The action was originally commenced before a justice of the peace, and plaintiff declared, "for that whereas, the plaintiff became and was a proper guest at the inn of the defendant, kept in the city of East Saginaw, Saginaw county, on the 21st day of February, 1862, and this plaintiff deposited with defendant, as inn-keeper, his, plaintiff's, overcoat, and a pair of gloves and a fur collar, all of the value of $25; that when plaintiff saw fit to leave he called for his said coat, gloves and collar, and the defendant did not then nor has he since delivered said goods to the plaintiff, although often requested so to do. The plaintiff asks of the court a judgment for the recovery of the value of said goods as above enumerated."

The case having been removed to the Circuit Court by appeal, evidence was there given upon which the Court rendered judgment for the plaintiff. The facts shown by the evidence are set forth in the opinion.

Sutherland & Miller, for plaintiff, argued that, even if the plaintiff did not become the guest of defendant, the latter would be liable for not returning the goods, unless they were lost without his fault. But the plaintiff did become his guest, in a legal sense, so that he is responsible for the goods, unless they were lost by the act of God, the public enemies, or by the act of the plaintiff: — *Edw. on Bailm.* 402–7; 9 *Pick.* 280; 5 *Barb.* 564; 5 *Blackf.* 323; 14 *Johns.* 175; 9 *Wend.* 114; 3 *Hill*, 488; 1 *A. & E.* 522; 5 *Q. B.* 164; 8 *Wend.* 547; *Story on Bailm.* § 470.

Digitized by Google

W. L. Webber, for defendant:

The extraordinary liability of the inn-keeper does not exist except as to those who are the guests of the house:—*Edw. on Bailm.* 394–412; 8 *Blackf.* 537; 3 *Hill*, 488. Plaintiff was not such a guest. See definitions, "Guest," *Webster*, *New Am. Cyc.*, *Bouv. Law Dic.*; "Inn," *Bac. Abr. Inns*, *B.*; *Calye's case*, 8 *Coke*, 32, *and note in* 1 *Smith Lead. Cas.*; 7 *Cush.* 417; 3 *Hill*, 488; *Story on Bailm.* § 477; *Bateman's Merc. Law*, 453-9. Plaintiff did not visit either the house or the saloon for the purpose for which *inns* were instituted. He went not as a traveller, nor as one seeking rest and lodgings, but for amusement, and merely because the party happened to be at that house. Had it been at a public hall, unconnected with a hotel, he would hardly have claimed the extraordinary liability of an inn-keeper to exist. Defendant had nothing to do with the individuals who attended the party; he did not look to them for pay, and could have no lien therefor upon goods deposited by them with him.

CHRISTIANCY J.:

The plaintiff seeks to recover for the loss of his property, solely upon the ground of the defendant's liability as inn-keeper; and his declaration will not warrant a recovery on the liability of an ordinary bailee. The facts of the case, so far as they are material to the question, are undisputed, and are substantially these: The defendant was the keeper of an inn or hotel, in East Saginaw, known as the Bancroft House. The plaintiff, though not a resident of the place, was at the time a guest at another inn, across the street, known as the Exchange Hotel, where he lodged and took his meals.

There was a firemen's ball at the defendant's hotel on the night in question, which the plaintiff attended. The arrangement for the ball between the fire company and the

Digitized by Google

defendant was, that defendant was to furnish dancing room, supper and dressing rooms, and was to be paid by the company, one dollar for each supper ticket. The tickets for admission to the ball were sold by a committee of the fire company at different places (part of them being sold at the door of the baggage room of the hotel, where the plaintiff purchased his). The price of these tickets was two dollars each. The reception committee was appointed by the fire company. At the door of the dancing hall, the ball tickets were taken up, and supper tickets given in their stead, by a man employed by the company.

The plaintiff, on going to the ball, delivered his overcoat, fur collar and gloves, at the office of the hotel, to the son of the defendant, who was clerk, and also registered his name. During the night, he spent money for liquor and cigars at a saloon kept in connection with the hotel, the defendant being proprietor of both, and the articles being sold by his servants. The saloon was on the ground floor, had a front entrance from the street, and a door at the rear opening into the hall of the hotel, and separated from the office by a hall leading to the dining room and the guest's washing room. Plaintiff remained at the party (ball) till it broke up, about five or six o'clock in the morning. Upon calling for his coat, collar and gloves, the defendant and his son looked for them, and they were not to be found.

Upon these facts, was the defendant liable as inn-keeper at common law? This is the only question in the case.

The common law liability of an inn-keeper, for the loss of the goods of his guest, is special and peculiar; depending (like that of common carriers) upon peculiar grounds of public policy, somewhat analogous to those which rendered the hundred liable for robberies:—*Smith's Lead. Cas.* (*ed.* 1852) 265; *Story on Bail.* §§ 464, 471: and while ordinary bailees are held responsible only on proof of loss arising from some fault on their part, such as neg-

Digitized by Google

ligence or want of diligence, the inn-keeper is held liable without proof of any negligence or fault; and, except in special cases, can not discharge himself by showing that the loss occurred without his fault or that of those in his employ.

But to hold the defendant liable as inn-keeper, it must appear not only that the defendant kept an inn, and that the goods were lost there, but that he was acting in the capacity of inn-keeper on the occasion when the goods were received, and that the plaintiff was his guest; or, in other words, that the plaintiff visited the inn for purposes which the common law recognizes as the purposes for which inns are kept.

By the original writ, specially framed for enforcing the liability of inn-keepers, as well as by the cases generally, an inn would seem to be a house kept for the accommodation and entertainment of travellers and wayfaring men, and not for those residing in the same neighborhood, who may visit, or others who may remain at the house for some special purpose not connected with passage or travel. See *Calye's case*, 8 *Coke*, 63 *and note to same*, 1 *Smith Lead. Cas.*; *also note to Coggs v. Bernard*, *ibid.*

In Thompson v. Lacy, 3 *B. & Ald.* 283, is said "the true definition of an inn is a house where the traveller is furnished with every thing which he has occasion for whilst on his way." In *Bac. Abr.* "*Inns*, *B.*", an inn-keeper is defined to be "a person who makes it his business to entertain travellers and passengers, and provide lodging and necessaries for them, their horses and attendants." In Calye's case, above cited, it is said "common inns are instituted for passengers and wayfaring men, and therefore if a neighbor, who is no traveller, as a friend at the request of the inn-holder lodges there, and his goods be stolen, &c., he shall not have an action; for the writ is ad hospitandos homines, &c., transeuntes et in eisdem hospitantes, &c."

Digitized by Google

So if a person come to an inn on a special contract to board there, the law treats him not as a guest, but as a boarder:—*Bac. Abr.* "*Inns, C.* 5," *Parkhurst v. Foster*, 1 *Salk.* 388; and the goods of a permanent boarder are not protected as those of a guest:—*Manning v. Wells*, 9 *Humph.* 746; *Kisten v. Hildebrand*, 9 *B. Monr.* 72, 74. So if a person, who is a guest, have a room specially for the purpose of showing or selling his goods, he can not hold the inn-keeper to his liability strictly as such, in respect to these goods:—*Burgess v. Clements*, 4 *M. & S.* 306.

In view of these authorities, and others which might be cited, we do not think the facts of this case show that the relation of inn-keeper and guest existed between the defendant and the plaintiff; nor that the defendant received the goods in his capacity of inn-keeper, but merely as an ordinary bailee. He could not, we think, have had a lien upon them for the plaintiff's bill. The plaintiff was no more the guest of the inn than any person residing across the street, and attending the ball on the same occasion. If a guest at all, he was rather the guest of the fire company. The defendant, on this particular occasion, was no more acting in the character of inn-keeper, as to those attending the ball, than any other person furnishing the rooms and supper, at any other house, for such special occasion. The plaintiff did not resort to the hotel for any purpose which brings him within the common law definition of the guest of an inn.

The judgment of the Court below must be reversed, and the defendant is entitled to a judgment in this Court for his costs in both courts.

The other Justices concurred.

Digitized by Google

Mark Flanigan v. Sidney S. Lampman.

Proof of fraud in voluntary assignment.—Where a voluntary assignment, ostensibly for the benefit of creditors, is assailed as fraudulent, the most liberal rules should prevail for the admission of any evidence which may tend to prove the fraud. The whole conduct of the assignee with reference to the property, after the assignment, should be allowed to be shown, as bearing upon the question of the intent with which the assignment was made. If that conduct has been entirely consistent with the professed objects of the assignment, it can not prejudice: but if it tend to show that the assignor still claims and seeks to derive a benefit from the property, to the prejudice of his creditors, it will generally tend, in a greater or less degree, to show that the assignment was originally made with this fraudulent purpose.

The assignee does not stand in the position of a bona fide purchaser for a valuable consideration; and the fraudulent intent of the assignor, in making the assignment, is sufficient to defeat the title of the assignee, though *he* may be innocent.

The defendant assailed an assignment as fraudulent; and having shown that one of the assignors bought of the assignee a horse and carriage, constituting a part of the assigned property, ostensibly as agent of his brother-in-law, who was a preferred creditor, and whose claim was alleged to be fictitious, he then asked the witness, "Who had and kept possession of said horse and carriage, after such sale, and up to the time of the present trial?" It was held that the question was proper, and the Court should have allowed it to be answered.

Curing the error where evidence has been erroneously excluded.—Where a question put by a party to his own witness is erroneously overruled, the error is not cured by his being allowed afterwards to put the same question to the witness of the other party on cross-examination.

Heard November 3d. Decided November 10th.

Error to Wayne Circuit, where Lampman sued Flanigan in replevin. To show title to the property replevied, the plaintiff produced in evidence a general assignment for the benefit of creditors, and gave evidence on the subject of possession of the chattels mentioned in said assignment, by virtue thereof; and rested.

The defendant justified as sheriff, under a writ of fieri facias, against the assignors in said assignment, Frost, Lane & Co., by virtue of which he had seized the property in question, after the day of the date of such assignment; and he produced and offered evidence tending to show fraud in said assignment, and in the possession of said assigned property after such assignment; and called one Whittemore as a witness; and he having testified that

Digitized by Google

Frost, one of said assignors, bought certain horses and carriages of the assigned property at private sale from the assignee, ostensibly as the agent of one Charles Ashworth, his (Frost's) brother-in-law, and one of the two preferred creditors in said assignment, and whose claim was alleged by defendant to be fraudulent and fictitious, said Whittemore was asked by defendant's counsel, "Who had, and kept possession of said horse and carriage, after such sale, and up to the time of the present trial?" To which question the plaintiff objected. The Court sustained the objection, and excluded the evidence.

The defendant, afterwards, on cross-examination of Charles Ashworth and Milton Frost, two of plaintiff's witnesses, asked them the same question put to said Whittemore, and said witnesses replied, that Frost did keep possession of said property up to the *last* trial, but as agent of said Ashworth; and another of plaintiff's witnesses, George M. Lane, on cross-examination by defendant, testified, "the said property remained in his possession at the time of the former trial."

The jury returned a verdict for the plaintiff.

H. M. Cheever and *W. E. Cheever*, for plaintiff in error.

J. P. Whittemore, *G. V. N. Lothrop* and *L. Bishop*, for defendant in error.

CHRISTIANCY J.:

We think the question put to the witness Whittemore, on the part of the defendant below, was erroneously overruled.

Assignments, ostensibly for the benefit of creditors, are so frequently resorted to by embarrassed debtors for their own benefit, as a convenient method of securing to themselves the property which justly belongs to their creditors, that, to avoid injustice, the most liberal rules should prevail for the admission of any evidence which may tend to prove the fraud. Possession of the assigned property

Digitized by Google

by the assignor, or his control over it, after the assignment, has always been held to have a strong bearing upon the question of intent with which the assignment was made. And this species of evidence is perhaps more generally resorted to than any other, to show a fraudulent intent in the execution of the instrument. And we think the whole conduct of the assignee with reference to the property, after the assignment, should be allowed to be shown, as bearing upon the question of intent. If that conduct has been entirely consistent with the professed objects of the assignment, it can not prejudice; but if it tend to show that the assignor still claims and seeks to derive a benefit from the property, to the prejudice of his creditors, it will generally tend, in a greater or less degree according to the circumstances of the case, to show that the assignment was originally made with this fraudulent purpose.

But it is urged that the question overruled related to possession after the sale by the assignee; and that, to affect his title, it should have been while he had control of the property, and that he must in some way have assented to it. But it had already been shown, by the same witness, that one of the assignors had bought certain horses and carriages of the assigned property, at private sale, from the assignee, ostensibly as the agent of one Ashworth, his brother-in-law, who was one of the preferred creditors mentioned in the assignment, and whose claim the defendant below insisted was fraudulent. If, therefore, it could be shown that the assignor, after this ostensible purchase, had kept possession of the property himself, down to the time of the trial, this, unexplained, would have some tendency to show, not only that the ostensible purchase in the name of his brother-in-law was but a sham, but also, in some degree, to show that the assignment had been made by him with a fraudulent intent. And though the assignee might have acted in good faith, and in ignorance of this fraudulent intent, either in the purchase or the assignment;

Digitized by Google

yet, if the assignment be found to have been made with this intent by the assignor, it would be void as to his creditors. The assignee does not stand in the position of a bona fide purchaser for a valuable consideration; and the fraudulent intent of the assignor, in making the assignment, is sufficient to defeat the title of the assignee, though *he* may be innocent.

The error in overruling the question put to Whittemore was not cured by the defendant's being allowed to ask the same question of the plaintiff's witnesses, on their cross-examination. A party can never be precluded from introducing competent evidence from his own witnesses, and compelled to trust the proof of any part of his case to the evidence he may be able to draw out on the cross-examination of those of his adversary. To hold that, by cross examining the witnesses of the adverse party upon the same matter, he had waived the error of the Court in excluding competent evidence offered in chief, would be to hold that he ought to have made the error of the Court as prejudicial to himself as possible. No amount of authorities could establish the soundness of such a proposition.

The judgment of the Circuit Court must be reversed, with costs of both courts, and a new trial granted.

The other Justices concurred.

Samuel Gregory and another v. Elijah Stanton and another.

Parties to foreclosures: costs.—A defendant in a suit to foreclose a mortgage on two parcels of land, answered, claiming one of them by paramount title, and disclaiming as to the other; and as to the last a decree was taken. It was held, that the bill should have been dismissed as to this defendant, with costs; as he was under the necessity of appearing and answering to protect his interest in the parcel claimed by him.

Heard November 4th. Decided November 10th.

Digitized by Google

GREGORY v. STANTON.

Appeal in Chancery from Genesee Circuit.

The bill was filed against Elijah Stanton and Stanton E. Reed, to foreclose a mortgage given by said Stanton on two parcels of land. The bill was taken as confessed by Stanton. Reed, who was made a party as a subsequent incumbrancer, answered, disclaiming as to one parcel, and claiming the other by a title paramount to the mortgage. The Court below made the usual decree, for the sale of the parcel as to which Reed disclaimed, on the failure by Stanton to pay the amount due and costs by a day named. Reed appealed, claiming that the Court below should have dismissed the bill as to him, with costs.

G. V. N. Lothrop, for complainant:

Reed can complain of nothing which is *in* the decree; but only of what is *not* in it; namely, *costs*. But costs are in the discretion of the Court: — *Comp. L.* § 5596. And when costs are lodged in such discretion, they do not furnish any ground for appeal: — 2 *Johns. Ch.* 317; 3 *Paige*, 88; 15 *Vt.* 185; *Ibid.* 576.

W. A. Moore, for defendant Reed.

MANNING J.:

Reed, the appellant, was made a party to the foreclosure as subsequent incumbrancer. The mortgage was of two pieces of land. Reed answered, claiming one of them by a title paramount to the mortgage, and a decree was taken as to the other in which he disclaimed having any interest. He was under the necessity of appearing and answering to protect his interest in the piece that was dropped. The Court, we think, should have dismissed the bill as to him, with costs.

The decree is affirmed as to Stanton, the mortgagor, and reversed as to Reed, and the bill as to him dismissed, with costs in both courts.

The other Justices concurred.

Digitized by Google

Lawrence Myers and another v. David Carr.

Locality of contract.—Liquors had been sent from New York to Michigan, to be sold by local agents. Defendant called on the owners in New York, and made a bargain with them for the liquors at a specified price, he paying the freight, and having the excess of "outage," if any, over the original outage, allowed. The owners gave him a letter to their agents in Michigan, stating these facts, which he delivered, and after examining the liquors, took them, and gave his note for the price. It was held, that the sale must be regarded as made in Michigan, and subject to its laws.

Pleadings: illegal consideration.—In assumpsit, illegality of consideration between the original parties to a promissory note, may be shown under the general issue. If any notice of a defense under the Prohibitory Liquor Law were necessary, a notice that the note "was given for the purchase price of certain intoxicating liquors, contrary to the statute in such case made and provided," is sufficient. Per MANNING J., CHRISTIANCY J. concurring.

Pleadings: exemptions from and exceptions in a statute.—In declaring on a statute, where there is an exception in the enacting clause, the pleader must negative the exception; but where there is no exception in the enacting clause, but an exemption in a proviso to the enacting clause, or in a subsequent section of the act, it is matter of defense, and must be shown by the defendant. Where, therefore, suit is brought for the price of spirituous or intoxicating liquors sold in Michigan, the plaintiffs can not recover, unless they bring themselves within the exemptions of the statute. Per MANNING J.; CHRISTIANCY J. concurring.

Heard October 8th and 9th. Decided November 10th.

Case made after judgment, from Washtenaw Circuit.

The declaration was upon a promissory note, with the common counts. Plea, the general issue, with notice "that the defendant will prove, on the trial of this cause, as a defense to said suit, that the promissory note, a copy of which is appended to said declaration, was given for the purchase price of certain intoxicating liquors, contrary to the statute in such case made and provided, and that the said plaintiffs are not *bona fide* holders of said promissory note."

On the trial, plaintiffs put the note in evidence. It was dated at Ypsilanti, April 9, 1862, and payable to the order of plaintiffs, at a banking office in Ypsilanti, on the 14th of November after date, and had been indorsed by the plaintiffs in blank. After showing that the amount due on the note was $213 96, the plaintiffs rested.

Digitized by Google

In his defense, the defendant testified as follows: "I gave this note for a bill of liquors, purporting to be spirituous or intoxicating liquors." Plaintiffs' counsel objected to this evidence, on the ground that, under his plea and notice, the defendant could not set up the provisions of the Prohibitory Liquor Law of this State; but the evidence was received by the Court. The defendant continued his testimony as follows:

"These liquors were in the city of Ypsilanti, when I made this note and took the liquors. They had been there from the fall before. Blodget had wanted me to buy the liquors — went to the depot for that purpose. I bought a barrel of rum, 35 gallons, a cask of wine, and a barrel of brandy.

"He, Blodget, was anxious to sell them to me; I asked terms; said he would sell on usual terms; did not buy them then. It run along till I was going down to inauguration, when Blodget gave me a letter to the plaintiffs; I stopped at New York city; saw some one who represented himself to be Myers, Jr. I did not buy them in New York of this Myers, Jr.; I bought them when I came back, of Blodget. I met a person in New York who said he was Myers, Jr.; he took me up stairs to show me some samples. He said they sold all their liquors by sample. He asked clerk when liquor was shipped to Wiard. I tasted the sample liquor. He said the Wiard bill was vintage of 1858, and this was same.

"When I came back to Ypsilanti, found Blodget had sold gin; tasted them, thought they were not as good as sample. Blodget insisted I should buy them; Joseph Martin looked at them. Doctor Ashley was there, and made remarks, which discouraged me. The wine was absolutely worthless—brandy good for nothing — rum so worthless I used to give it away to any one dry enough to drink it.

"The man I saw wrote a letter and gave to me; I brought this letter to Ypsilanti and delivered it to Blodget.

Digitized by Google

After I bought the liquor of Blodget, he asked me for it."

Cross-examination: "I think Joslin was present when I brought the letter into the office. The day I went up, I had the letter in my memorandum book—showed the letter to Blodget, and then put it back, and afterwards gave it to him when he asked me for it. I am not positive whether I handed Joslin the letter. I don't know whether I showed them (Joslin & Blodget) the letter before I purchased the liquor. I think Blodget stated they had received a letter from plaintiffs informing them of my visit. He read it over to me in New York, and I told him I should not purchase the liquors till I had examined them. He said, that as the young man had copied the letter, let it go, and he would be satisfied with any arrangement Mr. Blodget should make. As soon as we got through measuring and tasting the liquors, I loaded them up."

This was all the evidence offered by the defendant, and here he rested his defense.

Thereupon the plaintiffs called as a witness Chauncey Joslin, who testified as follows:

"This is the letter that Mr. Carr brought to my office; the signature is in the handwriting of Lawrence Myers. He delivered the letter in an unsealed envelope, and I read it. I handed the letter to Blodget, and he apparently read it. Blodget told him he had not got the pipe of gin. Carr stated he had bought these liquors of Myers in New York, and had brought this letter to show us about the delivery, and got time that we would not give, and some other terms. He proposed to go and get the liquors. We talked then, that by instructions of the letter we were to deliver the liquors to him, when regaged. He and Blodget left the office together, and were gone from one to two hours, and came back, and Blodget drew note, and Carr signed it, and Blodget asked about the letter, and Carr handed it out.

Digitized by Google

"I suppose the bill sold to Wiard contained a pipe of gin. The gin was sold by Blodget to Moorman. "Outage" means leakage, shrinkage. What he bought was the Wiard bill, less outage, and the pipe of gin."

The letter referred to by the witnesses was then read in evidence, as follows:

"NEW YORK, March 15th, 1861.

MESSRS. JOSLIN & BLODGET,

Ypsilanti:

Mr. David Carr, of Belleville, called on us in reference to the bill of merchandise forwarded to C. G. Wiard, and stored by you. We have sold it to him at the invoice cost, say $365; on eight months' credit from date of sale (yesterday), and 7 per cent. interest; he paying freight and charges to your place, and we paying the storage bill: any excess of outage, over the original outage, we will allow, and solicit you to receive note and forward it to us.

Yours truly, LAWRENCE MYERS & Co."

A. C. Blodget was also called for the plaintiffs, and testified as follows:

"Carr brought this letter to our office, and presented it. I told him he could not have the pipe of gin; went up and took off wax and tasted them, and he finally concluded to take them. They were delivered to him, and he put them in wagon and took them away; went to office and gave the note for the amount of New York bill, freights added, less outage and gin.

"Carr took them exactly as in that bill, with freights added, except the gin. Carr stated that he doubted whether they were as good as sample tasted in New York. The only doubt he had was whether he would take them, as the gin was gone; said he wanted the gin. Lawrence Myers resides in New York, and Pike in Ohio."

Joseph Martin, testified as follows:

"I was present. Carr inspected the liquors; I think he came into my shop. The rum he doubted whether it

Digitized by Google

was as good as mine. It was a lower priced rum than mine, but was a fair article of its kind."

This was all the testimony offered by the plaintiffs, and they then withdrew the note, and relied upon the common counts in their declaration.

From the foregoing testimony the Court found the following facts:

First. That the plaintiffs were residents of the States of New York and Ohio, and that the sale of the liquors in question was made in the city of New York.

Second. That a failure of consideration as to the quality of the goods was not sufficiently proven.

Third. That the value of the goods and the interest thereon to the 19th day of June, 1863, was two hundred and thirteen dollars and ninety-six cents; for which amount judgment was rendered for plaintiffs.

Norris & Ninde, for defendant:

1. The brandy and wine are proven to have been worthless. This partial failure of consideration should have affected the finding.

2. The note proven and upon which the plaintiff rested his case, with its interest, is the exact sum of the verdict. This note was withdrawn. There is, then, no *proof whatever* of number of gallons, or price per gallon, or of the leakage, or outage, or freights, or value of gin sold, or its amount, or of the charges, or of storage. There is no *data* in the case for the damages, on the count for goods sold and delivered.

3. Interest should not have been allowed. The pleadings and evidence do not justify it: — 7 *Rich.* 118.

4. The contract of sale for these liquors, and the sale, was void. If made in this State, this will be conceded.

As a matter of fact, the sale was made (consummated) in this State: — 2 *Pars. Cont.* 437, 441; 10 *Me.* 400; 2 *Ired.* 36.

Digitized by Google

As a matter of law, it was made subject to the law of this State, because the place of payment and performance is the place of contract, and these liquors were to be paid for at Ypsilanti: — 13 *Mass.* 23; 17 *Johns.* 511; 19 *N. Y.* 436; 7 *B. Monr.* 577; 8 *B. Monr.* 306; 6 *Pet.* 202; 13 *Pet.* 77; 5 *McLean*, 448; 30 *Miss.* 65; 3 *Strob.* 33; 3 *Story*, 474; 2 *Pars. Cont.* 95–100–102; *Story Confl. L.* § 280; *Story Notes*, § 104 *et seq.*

If the sale had been made in New York — of liquors in esse, when sold — and the laws of New York had been proven, the liquors delivered in New York, and the money to be paid in that State (all which suppositions are negatived in this case), even then it would be a contract injurious to the interests of the citizens of this State, and within the rule in *Story Confl. Laws*, § 244, as applied to western prohibitory liquor laws in 6 *Clark* (*Iowa*) 410.

5. No judgment can be legally had on common counts for goods sold and delivered, if it appear in evidence that a negotiable promissory note was given by the purchaser for such goods, and received and indorsed in blank by the seller, which note, in fixing the place of payment, has given a defense to the purchaser and maker, not known to the place of sale, or to the original contract of sale. If for any legal cause you can not recover on the note, you can not recover on the original cause of action: — 2 *Am. Lead. Cas.* 184, 186, 188.

Joslin & Blodget, for defendants in error:

1. The contract having been made in New York, was a valid contract there, and being good there, is equally valid everywhere: — 1 *Gray*, 536; 3 *Gray*, 482; 2 *Mass.* 84, 89; 3 *Met.* 207; 4 *Johns. Ch.* 487; 1 *Allen*, 484; 2 *Allen*, 266; 8 *Gray*, 584.

2. The plaintiffs insist, that under the plea and notice the defendant could not set up the liquor law: — 11 *Cush.*

Digitized by Google

130; 1 *B. & Ald.* 94; 1 *Johns.* 304; 7 *T. R.* 27; 2 *Pick.* 139; 17 *Vt.* 145.

3. Though the note was withdrawn from the consideration of the Court, as an item in or basis of the plaintiffs' claims for judgment, it was still before the Court as evidence in the case, for any other purpose, and especially as a memorandum, to show the amount of the account, like any other memorandum, signed by either party.

4. There is no evidence to show that plaintiffs and defendant had not given bond, under section 1672 of the Compiled Laws, and were authorized to sell. How, then, does it appear that the sale (if made in Michigan) was in violation of the statute?

MANNING J.:

The Circuit Court erred, we think, in finding from the evidence that the liquors were sold to defendant in the city of New York. The letter from plaintiffs to Joslin & Blodgett, of March 15, 1861, relied on to prove a sale, proves a contract for a sale and nothing more.

To constitute a sale of personal property there must be an actual or symbolical delivery of the property to the purchaser, or what is agreed upon by the parties, or understood in the course of trade, to be a delivery. The right of property must pass out of the vendor into the vendee, which is not the case where something remains to be done by the vendor before the delivery can take place. The letter to Joslin & Blodget was not an order on them for the delivery of the property to defendant. Had it been so intended by the plaintiffs, it would have been delivered to defendant, and not inclosed in an envelope and directed to them as plaintiffs' agents. The object of the letter was to inform them of the agreement plaintiffs had made with defendant, and to request them to carry it out by ascertaining the amount that would be due them, receive defendant's note therefor, and forward it to them. Defend-

Digitized by Google

ant was to be allowed for any excess of outage over the original outage. That is, as explained by the evidence, "leakage, shrinkage." Until this was ascertained, the amount of the note to be given could not be known, nor the delivery take place. Suppose, while defendant was on his way from New York, the liquors had been destroyed by fire, would the loss have fallen on him? Suppose Messrs. Joslin & Blodget had refused to deliver them; could he have maintained replevin or trover for them? We think not. The contract to sell was made in the city of New York, but the sale was consummated in Michigan.

The objection to the evidence to prove that the note was given for intoxicating liquors was not well taken. In assumpsit illegality of consideration between the original parties to a promissory note, may be given in evidence under the general issue. If notice of the defense was necessary, we think the notice given was sufficient, according to the decision of this Court in *Rosenbury v. Angell*, 6 *Mich.* 508, in which it was held that a notice that apprised the plaintiff with sufficient certainty of the defense to prevent his being taken by surprise on the trial, was sufficient.

A still further objection is, that the evidence does not show that plaintiffs were not within the exceptions of the statute, which must be proved, it is said, to show the illegality of the consideration of the note. The language of the statute is, "That no person shall be allowed to manufacture or sell, at any time, by himself, his clerks, servant or agent, directly or indirectly, any spirituous or intoxicating liquors, or any mixed liquors, a part of which is spirituous or intoxicating, except cider, beer, and wine of domestic manufacture, and except also as hereinafter specified." *Comp. L.* §1661. By a subsequent section, sellers of drugs and medicines whose sole or principal business is the selling of drugs and medicines, on giving

Digitized by Google

a bond to the People of the State, &c., are allowed to sell spirituous or intoxicating liquors to be used as a medicine, or as a chemical agent in scientific, mechanical or manufacturing purposes, and wine for sacramental purposes: § 1672. And the statute is not to apply to liquors imported under the laws of the United States and sold in the original packages in which they were imported: § 1678. The position of the plaintiffs is, that these several provisions of the statute must be negatived by proof to establish the defense.

In declaring on a statute, where there is an exception in the enacting clause, the pleader must negative the exception; but where there is no exception in the enacting clause, but an exemption in a proviso to the enacting clause, or in a subsequent section of the act, it is matter of defense, and must be shown by the defendant. *Attorney General v. Oakland County Bank*, *Walk. Ch.* 90; *Teel v. Fonda*, 4 *Johns.* 304; *Hart v. Cleis*, 8 *Johns.* 41; 3 *Johns.* 438; 1 *Johns.* 513. An exception excludes in express terms the thing excepted from the statute—leaving it as before the statute. A proviso only exempts a thing within the statute from its operation in certain circumstances, or on certain conditions. The word *except* is not necessary to create an exception, nor the word *provided* an exemption. Other words clearly indicating the one or other intention are sufficient. Cider and beer are excepted from the statute, wines are not. They are included in the words spirituous or intoxicating liquors. Wines of domestic manufacture, and imported liquors in the original packages in which they were imported, are exempted from its operation. All sellers of drugs and medicines are within the statute, while those only are within the exemption who are mentioned in § 1672. We must understand the statute as if it read, except cider and beer; provided wines of domestic manufacture, and imported and other liquors may be sold as hereinafter

Digitized by Google

provided. It was for plaintiffs to bring themselves within the exemptions of the statute, and not having done so, the judgment of the Court below must be reversed, and judgment be entered for defendant, with his costs in both Courts.

CHRISTIANCY J. concurred.

CAMPBELL J.

I am not entirely satisfied that, under our liquor law, the burden of proof is in general on the seller, to make his sale out to have been legal. I therefore abstain from giving an opinion upon that point, as it is immaterial in the view I take of this case.

I think that, on the facts, the sale must be regarded as subject to the laws of Michigan. The proof shows the liquors had been sent here previously, to be sold by local agents, and of course to be sold in this State. They were to be delivered here, and whatever contract was made between Carr and plaintiffs was knowingly made with the design that he should receive the property where it then was. I do not, therefore, consider it important whether the title absolutely passed in New York by the contract or not (although I think it did not); for it was made with a direct view to take practical effect in Michigan, and the liquor as before mentioned had been introduced into the State for the purpose of such a transfer.

The evidence showed that plaintiffs resided out of Michigan, and therefore negatived the idea that they could be qualified to sell here, as druggists or otherwise, under our statutes. It also showed the liquors to be in part spirits, and even if the sale had been in part of domestic wines, the sale of spirits would vitiate the contract unless that too was lawful. The only lawful sale of spirits, except by qualified persons, must be of imported liquors

Digitized by Google

in the original package. The burden of proving their imported character is laid *expressly* on the seller, and no proof was introduced on the subject.

I concur, therefore, in giving judgment for defendant.

MARTIN CH. J. concurred with Justice CAMPBELL.

George W. Underwood v. Henry Waldron and others.

Subscription for public purposes: Consideration.—Where a subscription is made by which the signers promise to pay the several sums subscribed, for the purpose of erecting a building for educational purposes, and something has been done, or some liability or duty assumed, in reliance upon the subscription, in order to carry out the object, the promises are binding, and may be enforced, although no pecuniary advantage is to result to the promissors.

But where, by its charter, a college was located at Spring Arbor, and a subscription was entered into for the purpose of erecting a college building therefor at Hillsdale, and it did not appear, by the subscription or otherwise, that it was designed as an inducement to the college to endeavor to obtain legislative authority to remove to Hillsdale, and it could not be lawfully removed without such authority, it was held, that the subscription, being for a purpose not authorized by law, was invalid.

Pleadings: Declaration.—The declaration against one of the subscribers, after setting forth the subscription, averred that the college at Spring Arbor decided not to use the building when completed, and the subscribers afterwards renewed their subscription, and indebtedness was incurred and the building was completed in reliance thereon. It was shown in evidence, that the renewal of the subscriptions and the erection of the building were *for the benefit of a new college to be established at Hillsdale.* This fact not being averred in the declaration, which only showed a subscription for the benefit of a college not located at Hillsdale, it was held, that no recovery could be had thereon.

Heard July 10th and 11th. Decided December 5th.

Error to Branch Circuit.

Henry Waldron, Chauncey W. Ferris and Allen Hammond, brought suit against Underwood in assumpsit, the declaration containing two counts, in substance as follows:

First Count: For that, on January 26, 1853, the defendant, the plaintiffs, and certain other persons, were desirous of erecting a college building in or near the village of Hillsdale, for the benefit of themselves severally, and the defendant, in consideration thereof, and for the purpose of

Digitized by Google

effecting said object, and in consideration that certain persons named did subscribe their names to the following agreement: "We, the subscribers, severally promise to pay the sums set opposite our respective names, to the order of Henry Waldron, Chauncey W. Ferris and Allen Hammond, for the purpose of purchasing land, or erecting a college building in or near the village of Hillsdale, for the use of the Michigan Central College; dated Fayette, January 26, 1853;" and did each set opposite their names, thereto subscribed, certain sums of money specified, and in consideration that certain other persons would subscribe their names to the said agreement, and would set opposite their names certain sums of money, to be paid as therein specified, the defendant did subscribe his name thereto, and promise to pay the plaintiffs $1000 as follows: $250 in four months; $250 in eight months; $250 in twelve months, and $250 in sixteen months; that other subscribers to said instrument, who are named, did subscribe thereto in consideration, among other things, of the defendant's subscription; yet that although the persons so subscribing have paid the amounts by them subscribed; and the plaintiffs have paid out and expended all the moneys paid them, in erecting said college building; and said building has been erected, and a large amount of indebtedness has been incurred on the faith of said subscription in erecting said college building, and plaintiffs have at all times been ready and desirous to use and expend the amount so subscribed by defendant for the purpose of paying such indebtedness; yet the said defendant refuses to pay, &c.

Second Count: Sets forth the subscription in the same manner; avers that afterwards, on July 1, 1853, defendant had paid $200 of the amount subscribed by him, and the other subscribers had also paid a large amount, in all $5000, which had been expended in erecting a college building; that the Michigan Central College decided not to use the building when completed, of which the defend-

Digitized by Google

ant had notice; that afterwards, on January 2, 1854, in consideration that the several other subscribers did then and there renew their said promises and undertakings, "he, the said defendant, undertook, and then and there faithfully promised the said plaintiffs to perform and fulfill the said agreement in writing, in all things on his part and behalf to be fulfilled and performed, and to pay the balance of the aforesaid sums of money, so subscribed by him as aforesaid, at the times aforesaid, to the said plaintiffs." And although other subscribers named have paid the amounts subscribed by them, and plaintiffs have expended all the money so paid them in erecting said college building, and the college building has been erected; and although a large amount of indebtedness has been incurred in erecting the same, and plaintiffs have at all times been ready to use and expend the amount so subscribed by defendant for the purposes of erecting said building and of paying such indebtedness; yet the defendant refuses to pay, &c.

Plea, the general issue.

The cause was tried by the Circuit Judge without a jury, and the following is his finding of facts:

"That on the 26th day of January, 1853, the defendant and Chauncey W. Ferris, William Waldron, Hewitt & McCollum, Henry Waldron, and certain other persons at the village of Hillsdale, were desirous of erecting a college building, in or near the village of Hillsdale, for the benefit of themselves severally.

"That the said defendant, for the purpose of effecting said object, and in consideration that the said Chauncey W. Ferris, William Waldron, Charles T. Mitchell, Hewitt & McCollum, and Henry Waldron, would subscribe their names to the agreement in writing, set out in the plaintiffs' declaration, to wit: 'We, the subscribers, severally promise to pay the sums set opposite our respective names to the order of Henry Waldron, Chauncey W. Ferris, and

Digitized by Google

Allen Hammond, for the purpose of purchasing land, or erecting a college building, in or near the village of Hillsdale, for the use of the Michigan Central College. Dated Fayette, January 26th, 1853.'

"And would set opposite their respective names, thereto subscribed, $1,000, payable as follows, viz.: $250 payable in four months, $250 in eight months, $250 in twelve months, and $250 in sixteen months, from the date thereof. And, in consideration that certain other persons would subscribe their names to the said agreement in writing, and would set opposite their respective names, thereto subscribed, certain sums of money, to be paid at certain times therein mentioned, the said defendant, on or about the 26th day of January, 1853, did subscribe his name to the said agreement, in writing, and did set opposite his name, thereto subscribed, $1,000, payable as follows, viz.: $250 in four months, $250 in eight months, $250 in twelve months, and $250 in sixteen months, from the date thereof.

"That, at the same time, the said Chauncey W. Ferris, William Waldron, Charles T. Mitchell, Hewitt & McCollum, and Henry Waldron, each subscribed their names to the said agreement in writing, and each set opposite their respective names, thereto subscribed, $1,000, payable at the same time, and in the same amounts, with the amount so as aforesaid subscribed by the said defendant.

"That the said defendant and the said Chauncey W. Ferris, William Waldron, Charles T. Mitchell, Hewitt & McCollum, and Henry Waldron, at the time they subscribed said agreement in writing, as aforesaid, did actually agree with each other that they would each subscribe $1,000 to said agreement in writing, as aforesaid, and would pay the same, in consideration that each of the others would subscribe the same amount to said agreement, payable at the same time, and would pay the same. And that the subscription of each, as aforesaid, was the inducement for the subscription of all the others.

Digitized by Google

"That at the same time the said defendant subscribed said agreement in writing, as aforesaid, and within a short time thereafter, certain other persons subscribed their names to the said agreement in writing, and to duplicates thereof, and set opposite their names, thereto subscribed, certain sums of money, amounting, in the aggregate, to the sum of about $12,000. That many of the other persons who subscribed said agreement did so in the presence of said defendant, and at his request, and in consideration that he had signed it as aforesaid.

"That the purpose for which said subscriptions were originally made, was for the purchasing land, or erecting a college building, in or near the village of Hillsdale, for the use of the 'Michigan Central College.' That the Michigan Central College referred to, was the institution of that name incorporated by act of the Legislature of the State of Michigan, approved March 19, 1845, and then located at Spring Arbor, in Jackson county, Michigan.

"That at the time of making said subscription, it was contemplated by the signers thereto, that said Michigan Central College should be removed to said Hillsdale, and use the premises proposed to be bought or built, and the proof of the last fact was objected to by the plaintiffs: that the subscribers knew, at the time of making said subscription, that the right of the Michigan Central College to remove to Hillsdale had been questioned, and was opposed by some of the trustees of said college.

"That on the first day of July, 1853, the said defendant had paid about $200 on his aforesaid subscription, and the said Chauncey W. Ferris, William Waldron, Charles T. Mitchell, Hewitt & McCollum, Henry Waldron, and certain other subscribers, had paid about $5,000 on their said subscriptions.

"That said amounts so paid had, at that time, been paid out and expended towards erecting a college building near the said village of Hillsdale.

Digitized by Google

"That about that time the Michigan Central College decided not to use said college building when the same should be completed, of which fact the said defendant had notice.

"That on or before January 1st, 1854, the idea of removing said Michigan Central College to Hillsdale, or of using said proposed new building by said Central College, was abandoned wholly and finally.

"That on the 27th day of September, 1853, Esbon Blackmar, who owned the land upon which said college building was being erected, conveyed said land by a sufficient deed to said defendant and certain other persons, with their knowledge and consent, upon the following trusts (among others): 1st, For the erection thereon of college or academical buildings, and for no other use or purpose whatsoever. 2d, To convey the said premises for the uses and purposes aforesaid, and not otherwise, and upon the express condition that the same should be applied to no other use or purpose whatever, to such board of trustees as may be appointed by the annual conference of the Michigan Free Will Baptist yearly meeting: provided, said board of trustees shall, within ten years from the date hereof (September 27, 1853,) be duly organized, with requisite forms to take and hold said premises, by and under the laws of the State of Michigan.

"That said defendant acted as one of the building committee for the erection of said college building, until about the 15th of October, 1853.

"That at and after the aforesaid deed of trust was made to the said defendant and others, by said Esbon Blackmar, the said defendant consented and agreed with the plaintiffs, and with the said Chauncey W. Ferris, William Waldron, Charles T. Mitchell, Hewitt & McCollum and Henry Waldron, that said college building should be erected, and should be used and occupied according to the terms and conditions of the aforesaid trust deed.

Digitized by Google

"That on or about the 2d day of January, 1854, a public meeting of the subscribers to the aforesaid agreement in writing, was held at the office of Mead & Pratt, in said village of Hillsdale, for the purpose of deciding whether the said subscribers should pay up their said subscriptions and proceed with the erection of said college building; and the said defendant, in consideration that the said Chauncey W. Ferris, William Waldron, Charles T. Mitchell, Hewitt & McCollum, and Henry Waldron, and certain other persons who had subscribed their names to said agreement in writing, did then and there verbally renew their aforesaid subscriptions, and did then and there verbally promise to pay them to the said plaintiffs, the said defendant did then and there promise the said plaintiffs, and the said Chauncey W. Ferris, William Waldron, Charles T. Mitchell, Hewitt & McCollum, and Henry Waldron, and the other subscribers then present, that he would pay the balance of the aforesaid subscription. That on or about the first day of January, 1856, the said defendant offered to pay the balance of the said subscription in flour, made from grown wheat. That on the 17th day of May, 1855, the board of trustees, appointed by the annual conference of the Michigan Free Will Baptist yearly meeting, were duly organized under and by virtue of the general college laws of this State, approved February 9, 1855, with the requisite powers to take and hold real estate, under the name and style of Hillsdale College, located at Hillsdale, Michigan. That on the 15th day of December, 1855, the said defendant, and the other grantees in the aforesaid deed of trust from the said Esbon Blackmar, conveyed the said premises described in said deed, and upon which said college building was erected, by a sufficient deed to the aforesaid trustees of Hillsdale College, and to their successors in office. That on the first day of January, 1856, the said Chauncey W. Ferris, William Waldron, Charles T. Mitchell, Hewitt & McCollum,

Digitized by Google

and Henry Waldron, had paid up the amount of their aforesaid subscriptions in full. That between $12,000 and $13,000 had been paid on the said subscriptions before the commencement of this suit.

"That before the commencement of this suit the plaintiffs had paid out and expended all the moneys so as aforesaid paid them on said subscription, in erecting said college buildings.

"That on the first day of January, 1856, said college buildings were erected and completed in said village of Hillsdale, and upon the premises described in the aforesaid trust deed from Esbon Blackmar to the defendant and others, and cost between $45,000 and $50,000. That at the time of the commencement of this suit, the indebtedness contracted on the faith of the aforesaid subscriptions, and other subscriptions, in erecting said college buildings, amounted to about $2,000.

"That the plaintiffs, through their treasurer, frequently called upon the defendant, before the commencement of this suit, to pay the balance of his aforesaid subscription.

"That the persons who acted as the faculty of the Michigan Central College, at the date of the aforesaid subscriptions, viz., January 26th, 1853, did, on the 7th day of November, 1855, commence an academical and collegiate school in said college building, and continued and carried on the same up to the time of the commencement of this suit; that Hillsdale College is under the control of the same denomination that the said Michigan Central College was, at the date of said subscriptions, viz.: The Free Will Baptist denomination; and that said denomination have endowed said Hillsdale College to the amount of $90,000.

"And I further find that the total amount of payments made by the defendant, in addition to certain amounts which were credited to him, many of which were made at his request, amounts to the sum of $493,66, leav-

Digitized by Google

ing unpaid on his subscription the sum of $504,34. To this add the interest up to the 23d of May, 1861, which is $285,44, and the amount due from him on his subscription is $791,78, for which amount the plaintiffs are entitled to judgment, with costs of suit to be taxed.

"And under the pleadings, and upon such finding, I hold as follows:

1st. That the said promise of defendant was one of mutual promise, and made in consideration of like mutual promises of said other signers of said subscription paper.

2d. That said mutual promises were a good and legal consideration for each other, and that therefore the promise of the defendant was a valid promise.

3d. That said promise of said defendant is sufficiently set forth in the first count, as a mutual promise upon the consideration of the mutual promises of the other subscribers, to enable the plaintiffs to recover thereon, on the first count of the declaration.

4th. That the purpose for which the original subscription was made, viz.: The purchasing land or erecting a college building, in or near the village of Hillsdale, for the use of the Michigan Central College, was not unlawful.

5th. That after the project of removing said Michigan Central College, or using said new college building in any way, by the Michigan Central College, had been abandoned, the new verbal agreement between defendant and said other subscribers, was a new promise, based upon new facts, and the same was legal.

6th. The same constituted new mutual promises between said subscribers, of which the promise of each constituted a valid consideration for the promise of the other.

7th. That such new promise of the said defendant is sufficiently set out in the second count of the declaration to entitle the plaintiffs to recover."

To these several rulings of the Circuit Judge, exceptions were taken by the defendant.

Digitized by Google

G. V. N. Lothrop and *T. M. Cooley*, for plaintiff in error, argued, that the subscription evidently contemplated a removal of the college from Spring Arbor, where it was located by its charter (*Laws* 1845, *p.* 36) to Hillsdale; and was therefore unlawful:—*Attorney General v. Oakland Co. Bank*, *Wal. Ch.* 90; *People v. Oakland Co. Bank*, 1 *Doug. Mich.* 282; *People v. Geneva College*, 5 *Wend.* 211. Also, that if the subscription was ever binding, it ceased to be so by the refusal of the Michigan Central College to accept and use the building, and all the evidence given of the organization of Hillsdale College, and of the subsequent proceedings, and that the renewed promise was made for its benefit, was irrelevant, because foreign to the case made by the declaration. A recovery has been had here upon a state of facts not declared upon. The action cannot be sustained on the ground of subsequent expenses or debts incurred on the faith of the subscription, because, *first*, it is not alleged that those were incurred by the *plaintiffs*, and any promise which the law would imply must be in favor of the party incurring them (4 *N. H.* 433; 2 *Pick.* 580; 5 *Pick.* 228; 12 *Mass.* 190; 2 *Gray*, 423; 5 *Ohio*, 56); *second*, the expenses and debts are not alleged as the consideration for defendant's promise—the sole consideration stated being the mutual promises of the subscribers—nor, *third*, are they alleged to have been incurred at the *request* of the defendant.

The fault in the declaration in setting forth a different consideration from the one now relied upon, is not cured by the judgment. 1. A defective statement of consideration is only aided by verdict when the objection is for the first time taken after verdict. If taken before, the plaintiff must amend. Otherwise, where the objection was erroneously overruled by the Court, this erroneous ruling would be allowed to make good a bad declaration. Here, the objection was taken on the trial. 2d,

Digitized by Google

The rule is only available where a consideration is alleged, but is defectively set out:—1 *Chit. Pl.* 300; 2 *Bing.* 464. If the consideration actually set out is not sufficient, judgment must be arrested:—4 *B. & C.* 345. 3d. The only consideration found by the Judge, is the mutual promises. For this Court to hold that the subsequent facts constituted a consideration would be, not to *aid* the declaration, but to *disregard* it; and not only so, but also to set aside the finding, and make a new finding of facts inconsistent, as regards the consideration, with that of the Circuit Judge, and enter judgment upon it. The finding is to be treated as a special verdict. Suppose a jury had found specially, that the consideration was mutual promises; could the Court, holding these promises invalid, enter judgment on the verdict on the ground that something else, which the jury had not found to be the consideration, in fact was so?

C. I. Walker, for defendants in error:

Is there a sufficient or a legal consideration? This question could, of course, have been raised on demurrer, but it is now sought to raise it upon error. This, of course, may be done, if no consideration appears in the declaration, or one that is clearly insufficient or illegal. But if, by a reasonable construction of the whole declaration, it sufficiently appears that there was a consideration capable of supporting the promise, then no advantage can be taken of the defective, informal, or uncertain manner in which the consideration may be stated. These defects are aided by verdict or judgment:—1 *Chit. Pl.* 300; 1 *Saund.* 228, (*a*); 4 *East*, 465; 2 *B. & P.* 265; 1 *New Rep.* 171; 2 *Bing.* 464.

If, therefore, the declaration shows, with reasonable certainty, that a sufficient consideration actually existed, although ever so imperfectly stated, these assignments of error are not well taken.

Digitized by Google

Before examining the declaration in the case, let us inquire what is a sufficient consideration to sustain an action upon a voluntary subscription for educational, charitable, religious, or other similar purpose.

There is a class of cases that recognize the doctrine that the consideration upon which the promise of each subscriber is founded, is the promise of the others to contribute to the same object, or, as is expressed by Parker, C. J., "it is a sufficient consideration that others were led to subscribe by the very subscription of the defendant:"—5 *Pick.* 506; 9 *Cush.* 537; 6 *N. H.* 194; 24 *Vt.* 189; 37 *Penn.* 213; 11 *Iowa*, 508; 2 *Ind.* 555; 2 *Denio*, 403; *Pars. on Con.* 377 *and note*; 2 *Kent*, 465 *and note*.

There is another class of cases that recognize the doctrine that the obligation of the promisee, to apply the money subscribed for the purposes for which it was subscribed—an obligation which can be enforced, at least in equity—is a good consideration for the promise of the subscriber:—8 *B. Monr.* 68; 24 *Vt.* 189; 6 *Pick.* 427.

The third class of cases recognize the doctrine that the subscription is in the nature of a proposition, which becomes mutual and binding when accepted by the promisee, and he, in good faith, *commences* the work contemplated by the subscription:—2 *Vt.* 48: 20 *Johns.* 89; 36 *Barb.* 577; 6 *Pick.* 427; 9 *Barb.* 211.

It is well established by a series of cases, that, where advances have been made, or expenses and liabilities incurred by others, in consequence of such subscriptions, before any notice of withdrawal, they are obligatory upon the subscribers, provided the advances were authorized by a fair and reasonable dependence upon the subscription, or were encouraged, or tacitly or expressly assented to by the subscribers:—6 *Md.* 115; 12 *Mass.* 190; 14 *Mass.* 171; 5 *Pick.* 506; 5 *Pick.* 228; 6 *Met.* 310; 9 *Barb.* 209; 15 *Barb.* 249; 2 *Kern.* 18; 3 *Scam.* 198; 33 *Penn.* 114; 4 *Mich.* 578.

Digitized by Google

In some of these cases the subscription is not considered a complete contract, but rather a conditional promise in consideration that the promisee, or other party, does the thing contemplated thereby, that, then, they will pay according to the terms of the subscription. The consideration or other terms of the contract, are to be proved by parol, or inferred from other circumstances:—9 *Barb.* 210; 5 *Barb.* 455; 25 *Wend.* 417.

And a proposition accepted and acted upon, although not mutual when made, becomes so by the acceptance and subsequent action:—14 *Mass.* 172; 5 *Pick.* 384; 6 *Pick.* 432; 12 *Pick.* 129; 7 *N. Y.* 349; 36 *Barb.* 581.

It is evident that this declaration was drawn by the pleader, upon the theory that the mutual promises of each subscriber were a sufficient consideration for the promise of the others. And this, we submit, is a sufficient consideration under the authorities cited. Courts will not inquire into the adequacy of the consideration for a contract, in the absence of fraud. The necessity of a consideration is rather a technical requisition, and the slightest act is frequently held a sufficient compliance with this technical requirement:—1 *Bing. N. C.* 490; 8 *A. & E.* 743; 18 *Johns.* 337; 1 *Met.* 84.

Why may not the *signing* of an agreement, by other parties, be, *of itself*, a sufficient consideration for a promise?

Then, too, may it not always be presumed that each promisor has a direct pecuniary interest in the accomplishment of the promise for which the subscription is made, and that he is interested in getting other parties to aid in its completion?

But suppose it should be held that such mutual subscriptions did not form a sufficient consideration for the individual promise of each subscriber; then the result is, that the consideration, specially and formally described in the declaration, is, in the eye of the law, no consideration; but it by no means follows that the declaration does not disclose the

Digitized by Google

actual existence of a good consideration. If facts are set forth which show that a legal consideration actually existed, although such facts are not set forth, technically, *as a consideration*, yet, as they show that there is an actual cause of action existing, on error the declaration will be held sufficient.

The facts set forth here are:

1st. That the promise was made by the defendant.

2d. That the plaintiffs accepted the proposition or promise thus made to them, and proceeded with the execution of the project contemplated, and actually completed the same.

3d. That, in so doing, they expended all the money paid into their hands on said subscription, and incurred an indebtedness, which still exists.

4th. The second count discloses positive acts of recognition and encouragement on the part of the defendant, by part payment, and by renewal of his promise to pay.

Now, these facts, which are clearly disclosed in the declaration, constitute, under *all* the authorities, a sufficient consideration for the defendant's promise.

The second count differs from the first mainly in the averment of the renewal of the defendant's promise, after the Michigan Central College decided not to use the buildings that were to be erected.

It is insisted that the declaration, if it discloses any consideration, discloses an *illegal* one; inasmuch as the buildings to be erected were for the use of the Michigan Central College, located at Spring Arbor, and said College had no legal right to accept, or use said buildings, or to change its location.

We deny that said College was by law located at Spring Arbor, or that it had not a right to use these buildings, or remove its locality to Hillsdale.

The name of the corporation is "the Michigan Central College, at Spring Arbor," but it is not located at Spring

Digitized by Google

Arbor, or any other point; and it may be removed, at the pleasure of the trustees, to any part of the State:—19 *E. L. & Eq.* 404.

But suppose it be true that the Michigan Central College had no right to remove to Hillsdale, or to use the buildings there to be erected, it does not follow that an agreement to erect the buildings was illegal. It was neither immoral, against public policy, or in violation of law.

A contract made by the corporation to erect the buildings, or to use them, might be invalid, but a contract between A and B to erect a building for C, that C could never use, would not make the contract between A and B void.

We submit, therefore, that the declaration, even if it should be found untechnical and defective, and describing as a consideration that which is not, is still good on error, inasmuch as a good and legal consideration is shown by the declaration itself to exist.

CAMPBELL J.:

Judgment was rendered against Underwood, in the Circuit Court, upon a subscription made to aid in erecting college buildings. He, with others, who were induced to subscribe by mutual reliance, agreed to pay certain sums to defendants in error, "*for the purpose of purchasing land or erecting a college building, in or near the village of Hillsdale, for the use of the Michigan Central College.*" Plaintiff in error acted as one of a building committee in erecting a building, portions of the subscriptions, including part of his own, having been paid in, and used for that purpose. In the summer of 1853, it was known the college refused to accept the building, or remove to Hillsdale. In September, 1853, the owner of the land conveyed it to plaintiff and others, in trust for the erection thereon of buildings for college purposes, and for the transfer

Digitized by Google

thereof to trustees who might, within ten years, be incorporated upon the appointment of the Free Will Baptist Conference of Michigan. The parties agreed that the enterprise should go on for these purposes, and, in January, 1854, plaintiff and the others met and renewed their subscriptions, and agreed to pay the unpaid balance. The building was completed, and conveyed by plaintiff in error and others to the corporation designated by the conference, and has been used since for its purposes. Most of the subscriptions have been paid. Plaintiff, in January, 1856, offered to pay in flour made from grown wheat, but not otherwise.

The conclusions at which we have arrived, under the peculiar state of the record in this case, render it necessary to make some examination of the principles which we think should govern in similar cases.

It is obvious to any one who has given any attention to religious and educational movements, in this country, that few institutions can be established except by combined effort in the form of subscriptions. It is equally clear that the success of such efforts is generally regarded as an advantage to the subscribers, as well as to the public. And whenever a church or school, or other like work, has been completed in reliance upon the promise of individuals to pay for it, if undertaken, courts have generally held the subscribers bound to fulfill their promises which have been thus acted on. But there is some confusion among the cases concerning the grounds, as well as the nature and extent, of the liability of subscribers to such purposes.

The difficulties met with in the cases refer, in general, to the parties to the agreement, or to what is loosely called the consideration, including in that term the assurance that the money promised will be beneficially applied. Objections for the want of parties are frequently classed with objections to the consideration; and parties have been

Digitized by Google

discharged upon grounds by no means clear or intelligible. Any extended criticism of the cases would be more curious than profitable, as the whole subject must properly be determined by the rules governing ordinary agreements.

There must therefore be not only a party promising, but a party to enforce the promise. And, although the amount of consideration is unimportant, the promise of a subscriber can only be enforced where something is done or undertaken in reliance on that promise, in a responsible shape. And, where a subscription is to accomplish a particular object, and no direct pecuniary advantage is to result to the promisor, the consideration must usually be something done or undertaken in order to carry out that object. These principles seem to be generally recognized.

It is intimated by Prof. Parsons, 1 *Pars. on Cont.* 378, that the simple promise of one subscriber to pay money can not be a sufficient consideration for a similar promise by another. But this principle, it is presumed, was intended to apply only where there is no person designated to receive the funds, who assumes or is bound to expend them for the purpose designed. The cases which have denied the force of subscriptions as mutual considerations, are usually cases where no payee is named or designated, or where the one designated is either incapable of acting, or does not assume and is not bound to act: — *Boutell v. Cowdin*, 9 *Mass.* 254; *Limerick Academy v. Davis*, 11 *Mass.* 113; *Farmington Academy v. Allen*, 14 *Mass.* 172. And where this difficulty has not existed, it has been recognized repeatedly that it is a sufficient consideration that others were led to subscribe by the very subscription of the defendant: — *Trustees v. Stetson*, 5 *Pick.* 506; *Watkins v. Eames*, 9 *Cush.* 537; *George v. Harris*, 4 *N. H.* 533; *Congregational Society v. Perry*, 6 *N. H.* 164; *Troy Academy v. Nelson*, 24 *Vt.* 189; *Amherst Academy v. Cowls*, 6 *Pick.* 427. Where work is done or expense incurred under a promise, the liability is not disputed by any authority.

Digitized by Google

Until the persons designated to receive the money assume their duties — or, where none are designated, until some person incurs expense or liability in fair reliance on the subscriptions — the offer of the subscribers may properly be regarded as liable to withdrawal. In such case the question is not properly whether there is any consideration for the agreement, but whether there is any agreement at all. Much of the confusion in the cases arises from not distinguishing between the contract and the consideration, and in not drawing any line between different forms of subscription to determine who are the contracting parties. There are decisions which hold, that subscriptions in favor of persons or corporations legally bound to apply such funds as are subscribed, in accordance with the wishes of the donors, need no acceptance or further action to make them binding on the subscribers: — *Troy Academy v. Nelson*, 24 *Vt.* 189; *Trustees v. Stetson*, 5 *Pick.* 506; *Amherst Academy v. Cowls*, 6 *Pick.* 427. In other cases there must, as it would seem, be an acceptance of the trust or duty, by some one competent in law to undertake it. And in all cases the object must be one which is not rendered evidently impossible by law or otherwise.

But where there is no legal or natural obstacle to the performance of the thing designed, and lawful means are provided, and competent agents are designated and accept their trust, it is not easy to see how such an agreement differs from any other valid contract whereby parties contract to furnish funds for a common object beneficial to them both. We can not hesitate to hold that a school or church, or other similar institution, which men are anxious to have built, and promise to pay for, is "valuable" to them in a legal sense. In most cases there is a pecuniary value in the enhanced price of neighboring property. But, apart from this, any worthy purpose for which men generally are willing to expend money, must be regarded by courts as worth money, when it is promised. We know of no safer test to apply to human transactions.

Digitized by Google

Had the declaration been properly framed, we should, therefore, be compelled to hold that the plaintiff in error was liable in this action. And we do not think the evidence admitted would have been improperly received to establish the case under proper pleadings. But we do not think the declaration so framed as to maintain the judgment. The case shows that the original promise was in favor of the Michigan Central College, and that the subsequent promise was for an entirely different purpose. The declaration in both counts is confined to a subscription for the use of the Michigan Central College.

The subscription is not framed, nor is the case so made out as to show it was designed, as an inducement to that college to endeavor to obtain authority to remove to Hillsdale. Such an undertaking would have been a good foundation for a subscription. As the case stands now, it shows a subscription for the use of a college not located at Hillsdale, and which never agreed to go there. The statute incorporating this college as the Michigan Central College at Spring Arbor, was, we think, operative to confine it to that place until amended; and the college could not be lawfully removed without permission from the Legislature:—*People v. Oakland Co. Bank,* 1 *Doug. Mich.* 282. The original subscription, being for an impossible purpose, was invalid; and the renewed subscription is not declared upon according to the facts, which would sustain it. A further amendment is therefore necessary in order to permit the proper evidence to be received. Judgment must be reversed, with costs, and a new trial granted.

CHRISTIANCY J., concurred.

MANNING J.:

The following is a copy of the subscription paper signed by the plaintiff in error and others: "We, the subscribers, severally promise to pay the sums set opposite our respective names, to the order of Henry Waldron,

Digitized by Google

Chauncey W. Ferris, and Allen Hammond, for the purpose of procuring land, or erecting a college building, in or near the village of Hillsdale, for the use of the Michigan Central College. Fayette, January 26th, 1853."

It is not denied that here is a promise, but it is said that the plaintiff in error is not bound by it, because there was no consideration for it. What is a consideration? The price paid or agreed to be paid for the promise — that is, the thing done or agreed to be done, is the consideration. Hence mutual promises are a good consideration for each other; as where A promises B to do a certain thing in consideration that B promises A to do a certain other thing. It is not necessary that either party should be pecuniarily benefited by the act done or to be done by the other. The promise may inure to the benefit of a third person, and not of the party to whom it is made. It is immaterial, therefore, that the college which is to receive the benefit of the promise is not a party to it. The benefit to the college is the inducement to, and not the consideration of, the promise, which is the subscription of the paper by others. Each subscriber promises to pay to the persons named in the subscription, for the purpose therein mentioned, the sum set opposite his name, in consideration of a like promise by every other subscriber. This is clearly implied in the subscription itself. It is the understanding of every person who puts his name to a subscription paper; and when the object is conducive to the public weal, as in the case before us, it seems to me it would be a strange perversion of legal principle to refuse to enforce the subscription on a plea of want of consideration. Most of our church and college edifices have been built by subscriptions like the one before us; and shall it be said that the law is indifferent to such enterprises, and that it looks on such subscriptions as blank pieces of paper? I think not.

Digitized by Google

Another objection is, that the college was located at Spring Arbor, and could not be removed to Hillsdale without a violation of its charter, and that the promise was, therefore, for an object that could not lawfully be accomplished. If it was to do an illegal act — by which I mean something that was evil in itself, or was prohibited by statute — or to do what was morally and physically impossible, the objection would be a valid one. The removal to Hillsdale would be unlawful only in the sense that it would be a violation of the contract between the college and State, which the latter might waive. It would not be a violation of any criminal or other law of the State; and it is but fair to presume that the subscribers contemplated a removal with the assent of the State. The contrary does not appear, and we are bound to suppose the parties had a lawful instead of an unlawful object in view, when both came within the phraseology of the agreement. We must so construe it as to give effect to it.

But the Judge finds that the college refused to remove to Hillsdale. That being the case, there was, it seems to me, a failure in the object of the enterprise that released the subscribers from its further prosecution. But he also found, that, after the refusal, a new promise was entered into to complete the building for another purpose, viz.: to be used and occupied according to the terms and conditions of a certain trust deed, mentioned in the finding. On this last promise the defendants in error, who were plaintiffs below, would have been entitled to a judgment had, it been set out in their declaration. They proved a different cause of action from the one stated in the pleadings.

MARTIN, CH. J. was not present when the cause was decided.

Judgment reversed.

Digitized by Google

Stephen C. Andrews v. Henry C. Kibbee and others.

Henry C. Kibbee v. Stephen C. Andrews and others.

Cross bill, its nature and purpose.—A cross bill for relief is always designed for the purpose of enabling a defendant to avail himself of some defense which can only be made complete by granting him some affirmative relief against complainant or against some co-defendant. It must be strictly confined to the matters involved in the original cause. Where a bill introduces other distinct matters, it is an original bill, and the suits are separate and distinct.

A judgment creditor filed his bill in equity to enforce the payment of the judgment, making one a defendant who was alleged to be indebted to, and also a fraudulent grantee of, the judgment debtor. This defendant afterwards filed his bill against the complainant, claiming to have become the owner of the debt for which the judgment was rendered, and of a collateral mortgage given to secure it, and praying to have his title to these securities established. The judgment debtor (who was the mortgagor in the collateral mortgage) and the holder of a prior mortgage were also made parties, and the bill prayed leave to redeem from the prior mortgage, and the foreclosure of the other. Held, that this was an *original*, and not a *cross* bill.

Parties to judgment creditor's bill.—Where the judgment creditor had assigned the demand upon which the judgment was rendered, to secure a debt of equal amount, it was held, that the assignee alone, or those succeeding to his rights, could bring suit in equity to enforce the judgment. The nominal residuary interest in equity of the assignor, could not entitle him to bring suit, unless it should be alleged in his bill that the assignee neglected or refused to do so, under circumstances calculated to prejudice his rights.

The fact that, in such a case, one of the defendants has become the assignee, will not enable the complainant to sustain his bill, which avers the ownership to be in himself; since the testimony showing the assignment, would also show that complainant had no right of action such as he set out in his bill.

Heard May 14th, 19th and 20th. Decided December 4th.

Appeal by Stephen C. Andrews, from decree made by the Wayne Circuit Court in Chancery. The facts, and the nature of the pleadings, sufficiently appear by the opinion.

J. P. Whittemore and *S. T. Douglass*, for the appellant, argued that, notwithstanding the assignment of the Porter Kibbee bond and mortgage to Henry C. Kibbee, Andrews had such an interest as entitled him to maintain a creditor's bill:—3 *Edw. Ch.* 106; 2 *Barb. Ch. Pr.* 174; 1 *Hill. on Mort.* 516. And that relief might be had on the case as it stands. Relief may be given on facts disclosed by answer:—10 *Yerg.* 118; 8 *Dana*, 183; 7 *Yerg.* 30, 36.

Digitized by Google

D. C. Holbrook and *G. V. N. Lothrop*, for Henry C. Kibbee, insisted that the second bill was not a *cross*, but an *original* bill. The bill of Andrews avers the judgment debt to be his own. The answer of Henry C. Kibbee is silent on the subject of this ownership, but notwithstanding this, the averment in the bill, being material, must be proved:—2 *Ohio*, 415; 6 *Cranch*, 51; 3 *Bibb*, 536; 21 *Ill.* 40; 2 *Gilm.* 67; 14 *Ark.* 641; 5 *Mich.* 179. But the averment is shown to be untrue, and that bill was therefore properly dismissed.

CAMPBELL J.:

These cases having been heard together, and it being claimed on the one hand, and denied on the other, that they are to be regarded as cross suits, and affected by the rules governing those, it becomes necessary, before referring to the peculiar form of the issues, to refer to such of the facts as may bear upon that portion of the controversy.

Porter Kibbee some years ago executed to William S. Driggs a bond for $5000, and an accompanying mortgage on certain property, which was incumbered by previous mortgages made by prior owners. This bond and mortgage were assigned by Griggs to Stephen C. Andrews, who, on the fifth of March, 1858, assigned them to his uncle James Andrews, to secure two notes for $2,700 each, payable respectively April 1, 1859, and April 1, 1860. In June, 1859, Stephen C. Andrews, who had retained the bond in his possession, sued Porter Kibbee upon it, in the name of Driggs for the use of said Stephen, and obtained judgment upon it September 12, 1859, and upon that judgment, after the return of an execution, filed a creditor's bill in his own name, claiming to be the sole owner of the claim, making no allusion to James Andrews or his interests, and bringing in Henry C. Kibbee as indebted to

Digitized by Google

Porter Kibbee upon alleged joint dealings, and as having taken the title to certain land from Porter Kibbee, with intent to hinder and defraud his creditors. The Buhls were brought in as purchasers of the same land. This bill was filed December 21, 1859, and was defended by Henry C. Kibbee, and proofs were taken from time to time on both sides. In March, 1861, Henry C. Kibbee purchased the securities which had been given by Stephen C. Andrews to James Andrews, and the bond and mortgage assigned as before mentioned. In August, 1861, he filed a bill to establish his title to the securities, and to foreclose the mortgage, making as defendants, George W. Bissell, as holding the prior incumbrances, which he claimed the right to redeem, Porter Kibbee, as mortgagor, and Stephen C. Andrews, as assignor of the securities, charged with having asserted a right to collect them for himself by the proceedings at law and in equity first mentioned, and as having colluded with Bissell to defeat the equity of redemption in the mortgaged premises by previous foreclosure purchases in Bissell's name. The Court below authorized Henry C. Kibbee to sue at law on the notes against Stephen C. Andrews, dismissed the bill of the latter, and granted a decree allowing a redemption and sale of the mortgaged premises, but directing the proceeds to be paid into court to be distributed as should be found proper on a subsequent inquiry.

Before examining into the other questions which may arise upon the testimony and pleadings, it is necessary to determine whether the bill filed by Henry C. Kibbee is a cross bill.

A cross bill for purposes of relief is always designed for the purpose of enabling a defendant to avail himself of some defense which can only be made complete by granting him some affirmative relief against complainant, or against some co-defendant. Equity rarely can grant any affirmative relief upon an answer alone. If this could

Digitized by Google

be done, there could never be any occasion for a cross bill, which must be strictly confined to the matters involved in the cause. A bill which introduces other distinct matters is an original bill, and the suits are separate and distinct:—*Story Eq. Pl.* § 631; *Griffith v. Merritt*, 19 *N. Y.* 529.

A brief comparison of the issues before us, shows that the two causes have very little in common, and have no common issue of any substantial importance. The suit of Andrews is purely a judgment creditor's bill on a personal judgment. The rights of James Andrews or his assignees are not referred to in the pleadings, and there is no reference in them to any mortgage security connected with the bond sued upon. Such a bill, had James Andrews retained his securities, would not have affected or prejudiced his rights. He might have filed such a bill as Kibbee's upon the same facts, and it could not be in any way connected with the former suit. The fact that Henry C. Kibbee is a defendant in the other suit, and is sought to be charged as a debtor or trustee of Porter Kibbee, does not prevent him from bringing such actions on his own account as he may see fit, and they can not be deemed cross actions unless the issues are dependent upon the same matters. A bill to foreclose or redeem a mortgage presents no case which could possibly be connected with a judgment creditor's bill. The controversies, although having an apparent relation arising out of the peculiar circumstances, have no legal dependence on each other, each having matters involved which are entirely foreign to the other.

The suits being distinct, each must be considered by itself, and determined upon its own facts. In the present case it may perhaps lead to no different result, inasmuch as no party can be entitled to any affirmative relief not warranted by the allegations in the pleadings.

The ownership by Stephen C. Andrews of the bond against Porter Kibbee, is not admitted by Henry C. Kibbee.

Digitized by Google

The judgment being in favor of Driggs, the nominal plaintiff, must, if valid at all, stand in favor of the real owner, whoever he may be. The evidence taken in the creditor's suit shows that Andrews had previously assigned the bond and mortgage to secure a debt of equal amount to James Andrews. The latter only, therefore, or those succeeding to his title, could bring a suit to enforce them. Stephen C. Andrews had, it is true, a nominal residuary interest in equity, but he could not on that account bring any suit in equity, unless it should be alleged in his bill that the assignee neglected or refused to do so, under circumstances calculated to prejudice his rights. He has no right otherwise to intermeddle with assigned property. The bill before us goes upon no such hypothesis. Stephen C. Andrews claims in that to be the sole owner of the bond on which he sues, and his pretensions are entirely adverse to those of his assignees, the bill not alluding to any assignment, but asserting the continuance of his original title.

It is claimed, however, that because Henry C. Kibbee has become possessed of the securities, and is a party defendant, the case under its present aspect is so changed as to rectify this objection. This is not so. The testimony which shows title in Henry C. Kibbee, shows that the complainant had no right of action such as he sets up in his bill. It is difficult to see how he could have amended his bill so as to remedy this defect, inasmuch as there is no evidence tending to show any indisposition in the assignees to enforce their claims, and Andrews makes no offer to redeem them. But be this as it may, the bill has not been amended, and no supplemental pleadings have been filed. The case stands in a position where no such question can be entertained. This bill was properly dismissed.

The decree upon Kibbee's bill is so framed as to guard all of the rights which Andrews may have in the premises. The only controversy arising upon Kibbee's rights in the

Digitized by Google

bond and mortgage is, whether the notes given to James Andrews are usurious, and on that account liable to deduction. The Court authorized a suit at law to be brought upon these, and the question is one which can be tried at law more appropriately than in equity. The decree granting a right to redeem from Bissell's liens, and a right to sell the mortgaged premises, is for the benefit of Andrews as much as of Kibbee; and, inasmuch as it requires the proceeds to be paid into court, and not to Kibbee, the latter can only receive hereafter so much as may be found due him on the notes, which will be determined most effectively in the suit at law.

The decree must be affirmed, with costs.

MANNING and CHRISTIANCY JJ. concurred.

MARTIN CH. J. was not present at the decision.

Maurice Hickey and another v. David M. Hinsdale.

Invalid agreement not an estoppel. — A paper signed by a judgment debtor, and delivered to the attorney for his creditors, after execution issued on the judgment has been levied, by which he agrees to settle the judgment, by paying a certain amount in notes satisfactory to the attorney, or, in default thereof, to turn out the property levied upon in payment, is neither valid as a contract, nor can it operate by way of estoppel against the debtor, where it appears that the creditors had given the attorney no authority to receive such a paper, or to compromise the action in any manner.

Admissions by invalid agreement. — But, in an action of replevin brought by the debtor, for the property levied upon, it was held, that said paper was admissible in evidence against him, as a parol admission of the facts recited in it, and open to explanation and contradiction as such.

Replevin of property in plaintiff's possession. — Where an officer, by virtue of an execution, levied upon property in the dwelling house of the judgment debtor, and made an inventory and appraisal thereof, but did not remove the same, and left the house and the property as he found them, but still claiming the property by virtue of the levy, and the judgment debtor brought replevin therefor; it was held that, as the property was in his actual possession at the time of suing out the writ, the action could not be maintained.

Digitized by Google

HICKEY v. HINSDALE.

Replevin under our statute is peculiarly a possessory action; and its primary object is to enable the plaintiff to obtain the actual possession of property wrongfully detained from him by the defendant at the time the action is brought.

Heard October 14th. Decided December 5th.

Error to Wayne Circuit.

The action was replevin, by Hinsdale against Hickey and Bigelow, who justified under an execution against Hinsdale, by virtue of which Hickey, acting as constable, and by direction of Bigelow, levied on the property replevied, which consisted mainly of household furniture. The execution was issued upon a judgment in favor of McBride, Robinson and Hoover, against Hinsdale as garnishee of Samuel Chamberlain, rendered March 1, 1858, for $249 58. On the trial, the defendants, as a part of their case, offered in evidence a paper in the words and figures following, to wit:

"I hereby agree to settle the claim of McBride, Robinson and Hoover, against me, as garnishee of Samuel Chamberlain, within three days from this date, by paying to J. E. Bigelow, attorney for said parties, the sum of twenty-five dollars, and giving him two promissory notes, one for $100 payable in ninety days, secured satisfactorily to said Bigelow, and the other for $125, secured satisfactorily to said Bigelow, payable in nine months, and that in case of a failure to perfect said settlement, that I will turn out the property levied upon by said Hickey, by virtue of an execution in said cause, to be applied in payment of said debt, except the $250 worth, and three stoves put up, selected by me as exempt by law. *D. M. Hinsdale.*

Detroit, March 1, 1859."

The evidence being closed, the defendants submitted to the Court, in writing, several propositions of law, deemed by them to be material to the case, and required decision upon the same; among which were the following:

1. "That the above writing signed by Hinsdale (which was admitted subject to objection) is competent evidence

Digitized by Google

in the case. Defendants insist that it is competent as an admission of a levy by Hickey, and a selection by Hinsdale of the two hundred and fifty dollars exemption; also, that it operates as an estoppel upon Hinsdale from replevying during the three days expressed in said writing, and also estops him from denying that all proceedings taken under the execution prior to said writing had been regular. Said writing is not void under the statute —it is not a bill of sale, mortgage or lien."

As to this proposition, the Court found that the alleged contract of the plaintiff was competent evidence for some purposes; that it was not a valid and binding contract, for the reason that no consideration appears upon its face, nor was proved, and also because the evidence showed that the attorney for the plaintiffs in that case, the said defendant Bigelow, had no authority to enter into such a contract on their part to compromise the judgment, and that it was an attempted compromise of the debt, and that an objection being taken to the admission of the alleged agreement, no attempt whatever was made to offer any evidence of a consideration, or of authority to Bigelow to make the compromise. The Court found, further, that it was not an admission of the legality and regularity of the proceedings of the defendants; that it was not an admission of facts not appearing to have been known to the plaintiff at the time; that, as the evidence appeared, said paper could not operate as an estoppel, but that it would still have been void under the statute without the wife's signature, as a contract for the creation of a lien upon household furniture, and also upon certain articles in said inventory, which are exempt from execution by name.

2. "That the plaintiff can not recover, because the property was in his own possession at the time the writ of replevin issued."

As to this the Court found, that the property having been levied upon on said execution, the levy not having

Digitized by Google

been released, the property remained in the legal custody of said Hickey, although left by him in the house of said plaintiff.

And the proceedings on the execution appearing to have been irregular, the Court rendered judgment for the plaintiff.

J. E. Bigelow, for plaintiff in error.

W. C. Hoyt, and *H. C. Knight*, for defendant in error.

CHRISTIANCY, J.:

There was no error in holding that the agreement signed by Hinsdale was not a valid contract, and could not, therefore, operate as an estoppel against him. But the Court held it was admissible "for some purposes;" and we think it was admissible as a parol admission of the facts recited in it, and open to explanation and contradiction as such.

But, as we understand the finding of facts, we think the Court erred in holding the plaintiff below entitled to maintain the action of replevin for the goods in question, as they seem to have been already in his possession at the time the writ of replevin was issued: for though it is found that defendant Hickey, when he levied upon the goods in the dwelling house of Hinsdale, took them into his posession, it seems to have been only so far as merely to make an inventory and appraisal of them; as it is further found that "he did not in fact remove the goods from the house, but that he made no release thereof, or of any part of them, from said levy, but left the house and property as he found it, still claiming the property by virtue of said levy; and whilst said defendants" (plaintiffs in error) "were absent from said house, and before the time had expired for perfecting the settlement according to the agreement offered in evidence, the plaintiff issued his writ of replevin," &c. It is clear from this that, whatever

Digitized by Google

right of possession Hickey may have had or claimed, the property was *in the actual possession of Hinsdale*, the plaintiff below, at the time he sued out his writ of replevin: while, upon the plaintiff's own theory, Hickey had not even the *right*, but a mere *claim* of possession: since the bringing the action, and plaintiff's affidavit to obtain the writ, denied the defendants' right of possession. So far as the levy upon the property may have been illegal, or the defendants' interference with it, under the claim of a levy, unauthorized, doubtless the plaintiff below might have had an action of trespass for such wrong, though the property had been returned to or left in his possession (and possibly of trover for a conversion). But the action of replevin (under our statute at least) is peculiarly a possessory action; and its primary object is to enable the plaintiff to obtain the actual possession of property wrongfully detained from him by the defendant at the time the action is brought. The statute, and the whole theory of the action, go upon the assumption that the plaintiff is not in actual possession of the property, and that the defendant wrongfully withholds that possession from him. Why bring the action to obtain the possession if the plaintiff has it already without suit? A mere claim to the right of possession by another cannot give the right to maintain replevin, while the plaintiff has the possession in fact. An action of replevin is not in the nature of a bill *quia timet.*

But the counsel for defendant in error insists that section one of chapter one hundred and fifty two, Compiled Laws, gives the action in all cases of a wrongful taking. The language is, "Whenever any goods or chattels shall have been unlawfully taken or unlawfully detained, an action of replevin may be brought *for the recovery thereof*," &c. But it is very plain from the subsequent provisions of the statute, in reference to the affidavit, the writ, declaration, &c., as well as from the nature and

Digitized by Google

object of the action itself, that a wrongful taking alone will not sustain the action, if the possession has been restored to the plaintiff, or he has it at the time the suit is instituted.

At common law replevin could only be maintained where the original taking (as well as the subsequent detention) was unlawful:—1 *Chit. Pl.* 186 *to* 190. Detinue was the common law action to obtain the property where the defendant came rightfully into possession, and the detention only was wrongful. The object of this provision of our statute was to extend the remedy by replevin, so as to include both classes of cases. But in both equally there must be an unlawful detention at the time of the institution of the suit. This detention is the whole gist of the action.

The finding of facts does not therefore support the judgment. The judgment must be reversed, and the plaintiffs in error must recover their costs in this Court and the Court below.

The other Justices concurred.

Richard P. Fitzhugh v. John L. Barnard and others.

Bona fide purchaser of lands: notice of want of title.—A person who, at the time of receiving a deed from another, knows him to have no title, or has notice of his want of title, cannot be a bona fide purchaser under the recording laws, whether the real owner of the title is known to him or not.

Notice of what appears in chain of title.—A grantee is chargeable with notice of whatever appears in the chain of title through which he claims.

A mortgage was given in 1832, and was foreclosed in 1835, and the premises conveyed to the mortgagees; but the deed was not recorded in the proper county. They soon after transferred the land by deed which was duly recorded. In 1856 the mortgagor made a deed of the same premises, subject to the mortgage, describing it as given "in 1830 or 1831." Held that this was sufficient notice to the grantee, not only of the mortgage, but that it was still unpaid; and after the lapse of twenty-four years, he had every

Digitized by Google

reason to believe it had been foreclosed. The grantee, therefore, could not, in good faith, claim anything in opposition to the mortgage and the rights which had accrued under it.

Bill to quiet title: Complainant not in possession of part of the premises.—A bill was filed to quiet complainant's title to land bounded on a river, of the whole of which he was in possession except a small portion—being a boom, embracing the bed of the stream and a foot path on the bank. His title to the whole was the same, and was undoubted. Held, that a decree quieting his title to the whole of the land was properly granted.

But held, also, that the Court could not go further, and take an account of the rents and profits of the boom while occupied by the defendants as wrong doers. Their possession was that of trespassers, for which complainant had adequate remedy at law; and not the possession of trustees, for which they might be called to account in equity.

Heard October 22d. Decided December 5th.

Appeal by defendants from Saginaw Circuit in Chancery. The facts necessary to an understanding of the legal questions are sufficiently stated in the opinion.

W. L. Webber and *G. V. N. Lothrop*, for complainant:

Newell Barnard had notice of complainant's title when he received the deed from Riggs. The legal title appeared in Fitzghugh by the Saginaw records, through the mortgage deed of Riggs to Howard and Wadhams, and the conveyance by them to Fitzhugh in 1856. Though this was a mortgage title, still it was a legal title, and gave the right to the possession. *Schwarz v. Sears*, *Wal. Ch.* 170; *Stevens v. Brown*, *Wal. Ch.* 41; *Mundy v. Monroe*, 1 *Mich.* 68. Complainant's possession was notice: 2 *Lead. Cas. in Eq.* 165. N. Barnard himself occupied as subtenant of complainant; and no tenant will be allowed to ignore his landlord's claim of title: 1 *Greenl. Ev.* § 24. The sub-lease to Barnard expressly refers to complainant's lease to Partridge, and this is notice: 2 *Lead. Cas. in Eq.* 168–9. And there is other evidence of actual knowledge. J. L. Barnard is bound by the notice to N. Barnard, who acted for him. But J. L. Barnard is clearly a man of straw: it is Newell Barnard who is the real party.

Under the evidence it is claimed that complainant was

Digitized by Google

in possession of all the premises, including the boom. On the case as it stands, an account of the rents and profits of the boom should be decreed. It is possible that the bill was originally open to the objection of multifariousness; but that objection was not taken either by answer or demurrer, and should not be heard now: *Story Eq. Pl.* § 284, 284 *a*; 3 *How.* 333; 4 *Blackf.* 249; 9 *G. & J.* 281; 10 *G. & J.* 480; 10 *Ohio*, 456.

Moore & Gaylord and *C. I. Walker*, for defendants:

The bill should have been dismissed as to Newell Barnard. It is not alleged or pretended that he sets up any claim in himself in the premises. The bill cannot be sustained for the purpose of an accounting. There seems to be but one class of cases where rents and profits can be recovered by bill in equity, for a *tortious* occupation of lands; and that is, where the lands belong to an infant. The wrong doer is then considered as guardian or trustee for the infant, who is greatly favored. 1 *Story Eq.* § 511; 3 *Vern.* 723; 2 *Vern.* 342; 1 *Vern.* 295; 3 *Atk.* 262; 1 *Ves. sr.* 232; 6 *Ves.* 73. Though the objection of multifariousness is not taken at all by demurrer or answer, the Court may, *sua sponte*, dismiss the bill for this cause. But that is not the only ground of objection. The claim for the rents and profits is not one of equitable jurisdiction. It can only be prosecuted at law. The bill should also be dismissed as to Avery, Eddy and Murphy, who are only made parties for the purposes of an accounting.

Complainant has not established his title as against John L. Barnard. The simple quit claim of the land by the mortgagees, after decree of foreclosure, making no reference either to the mortgage, the debt secured thereby, or the decree, could not operate as an assignment of the mortgage, or of the decree into which it was merged. It was a mere nullity: 1 *Wash. on Real Prop.* 521,

Digitized by Google

note; 5 *Fost.* 425; 2 *Cow.* 195; 1 *Ala.* 728; 1 *Ohio*, 157; *Dougherty v Randall*, 3 *Mich.* 587.

Two questions, therefore, arise: 1. Is any one of the grantees in the chain of Newell Barnard's title a purchaser for a valuable consideration? 2. If so, did he purchase without notice of complainant's title by the unrecorded deed, or of the existence of a title or lien under the mortgage?

As to the first: the evidence shows Sutherland and both the Barnards to have purchased for a valuable consideration.

As to the second: it will be claimed that the exception in the covenant against incumbrances, in the deed from Lauren P. Riggs to Jeremiah Riggs, of a mortgage given in 1830 or 1831, for $1,000, to Howard & Wadhams, is a constructive notice of the present existence of that mortgage or a title under it. But from the time of the record of that mortgage to the execution of the deed of Lauren P. Riggs, more than 22 years had elapsed, and the presumption of payment had become conclusive. 5 *Johns. Ch.* 552; 12 *Johns.* 242; *Cook v. Finkler*, 9 *Mich.* 131.

The quit-claim deed on record, from the mortgagees to the complainant, was on the records of *deeds*, not of *mortgages*, and could give no notice to an investigator of title tracing the mortgage interest. It is, too, a mere naked quit-claim, making no reference to the mortgage, and was, so far as a conveyance of the mortgage title is concerned, a mere nullity. Indeed, a title by quit-claim is of itself said to be suspicious. 33 *Miss.* 291.

The exception in the deed of Lauren P. Riggs does not recite or state the fact that there is any such existing incumbrance; it simply warrants the grantee against *any other claim* than this, leaving the title as to this without a warranty.

It certainly does not give *any* notice that this mort-

Digitized by Google

gage had ripened into a title absolute more than twenty years before. The implication is directly otherwise—that the fee was still in Lauren P. Riggs, subject to no incumbrance, unless it was to a certain mortgage, and as to *that*, it asserted nothing.

But if complainant claims the benefit of this notice, he must limit his claim to the mortgage. Of this only did it give any notice, and no record authorized any inference that it had ripened into a title. Now the record in relation to that mortgage raised the clear presumption of payment.

We insist, therefore, that there was no constructive notice of complainant's title, or of any title under that mortgage.

Actual notice of complainant's title is not established by the evidence.

To give the master's deed any force against defendants, they should have had notice of the existence of *that deed.*—2 *Lead. Cas. in Eq.* 184; 6 *Barb.* 373; 16 *Miss.* 418; 2 *Md.* 672; 1 *S. & M.* 78; 17 *Wend.* 24.

Of this there is no evidence.

The *quasi* possession under complainant was evidence merely of the *claim* of complainant; a claim which investigation showed to be without foundation.—1 *Hill. on Vendors*, 405; 2 *Sug. on Vendors*, 1052, *n.*; 2 *Lead. Cas. in Eq.* 168.

The next issue is as to the possession of the complainant. This is admitted and proved as to a portion of the lands, and denied as to the *boom*, which constituted the most important part of the premises described in the bill.

To maintain the suit, actual possession is necessary, both under and without the statute.—2 *Comp. L.* § 3490; 8 *Ohio*, 384; 13 *Ill.* 205; 17 *Ill.* 139; 3 *Halst. Ch.* 341; 4 *Cal.* 43.

The *ground* of the jurisdiction of the court of equity,

Digitized by Google

is, that in no other way can a person in possession *quiet his title.* And the fact of jurisdiction is confined to cases where there is no other redress.—*Stockton v. Williams*, *Wal. Ch.* 120, *& 1 Doug. Mich.* 546.

For this reason the bill should be dismissed.

MANNING J.:

This is a bill to remove a cloud from complainant's title. It prays a release from John L. Barnard, one of the defendants, of an alleged pretended title set up by him to the premises mentioned in the bill, and an accounting by him and the other defendants, for the rents, profits and use of a boom, situated upon and occupying a part of the premises, for the years 1860 and 1861.

We entertain no doubt as to complainant's title, and his right to a release from the defendant John L. Barnard.

The land in controversy was taken up by Henry Howard, in 1829. In July, 1831, it was conveyed by him to Lauren P. Riggs, from whom both parties claim title. On the 3d October, 1832, Riggs mortgaged the land to Henry Howard and Ralph Wadhams, for one thousand dollars. This mortgage was afterwards foreclosed by Howard and Wadhams, in the Supreme Court of the Territory of Michigan, and the mortgaged premises were sold and deed given under the decree to Howard & Wadhams, by William Draper, master in chancery, on the 18th April, 1835. The master's deed was recorded in Oakland county, instead of Saginaw county where it should have been recorded. On the 3d May, 1836, Howard & Wadhams conveyed to Fitzhugh, the complainant. Such is complainant's title from Riggs.

Now for Barnard's title. On the 9th September, 1856, twenty years after Fitzhugh had acquired his title, Lauren P. Riggs conveyed the premises to Jeremiah Riggs, with a covenant of seizin, and against incumbrances,

Digitized by Google

"except a mortgage given in 1830, or 1831, for one thousand dollars, to Howard & Wadhams." Jeremiah Riggs, on the 5th March, 1857, quit-claimed one undivided half of the premises to J. G. Sutherland, who, on the 10th April, 1860, quit-claimed to J. White, who, on the same day, quit-claimed to Barnard. On the 6th February, 1858, Jeremiah Riggs quit-claimed the other undivided half to defendant Newell Barnard, who, on the 19th March, 1858, quit-claimed to J. L. Barnard.

Had the deed from Draper, the master in chancery, to Howard & Wadhams, been recorded in Saginaw county, there could have been no question in regard to complainant's title. Has J. L. Barnard, by reason of its not having been recorded in that county, acquired a title under the registry laws superior to the title of complainant? That is the question to be answered: and the answer to it depends on the answer that may be given to another question, viz.: is he a bona fide purchaser without notice of complainant's title? If he and those through whom he claims had notice that L. P. Riggs had no title when he conveyed to Jeremiah Riggs, it is immaterial whether he or they knew the title to be in complainant or not, or whether he or they did or did not know of the existence of the master's deed to Howard & Wadhams. No one taking a deed from another knowing him to have no title, or having notice of his want of title, can be a bona fide purchaser. To take a conveyance under such circumstances, to be used against the true title, is a fraud, whether the holder of that title be known or not. If known, it is to defraud a particular individual; if unknown, whoever may hold the title.

It is a well settled principle of law, that a grantee is chargeable with notice of whatever appears in the chain of title through which he claims:—*Mason v. Payne, Walk. Ch.* 459. J. L. Barnard and his grantors are therefore chargeable with notice of the exception in the deed

Digitized by Google

from L. P. Riggs to Jeremiah Riggs, as well as with notice of the mortgage from L. P. Riggs to Howard & Wadhams, which was recorded and the record uncancelled. The deed excepts this mortgage from the covenant against incumbrances. The language of the exception is, "except ing a mortgage given in 1830 or 1831, for one thousand dollars, to Howard & Wadhams." The mortgage was given in 1832, instead of 1830 or 1831 — twenty-four years before the deed. Here was sufficient notice to have put J. L. Barnard and his grantors on inquiry. With such notice before them, they cannot, in good faith, claim anything in opposition to the mortgage and rights that have accrued under it. Had they gone to Howard & Wadhams for information, as they should have done, they would have been informed of the foreclosure, and of the purchase by them at the master's sale. The exception was not only notice of the mortgage, but that it had not been paid by the mortgagor, and, after the expiration of twenty-four years, there was every reason to believe it had been foreclosed. At the same time, the registry of deeds showed that the mortgaged premises had been conveyed by Howard & Wadhams to complainant. Nor is this all as to notice to N. Barnard, who was instrumental in getting the pretended title into the hands of his brother. On the 29th November, 1856, he took a lease for three years of the boom, which is on a part of the premises, from one Partridge, who claimed under a lease from complainant — the lease to Barnard in express terms referring to and mentioning the lease from complainant to Partridge.

Aside from notice, the evidence in the case, we think, shows that there was nothing bona fide in any of the conveyances in the chain of title from L. P. Riggs to J. L. Barnard. We can not think any one connected with the title was deceived by it, or supposed he was acquiring any thing more than the pretext of a title, which he

Digitized by Google

might sell for a greater or less price, to the real owner of the land, or to some dealer in doubtful titles.

Complainant was in actual possession of the premises at the time of filing the bill except the part used for the boom. The evidence does not, we think, show him to have been in actual possession of the boom, and it is for that reason insisted by defendants that the bill should be dismissed, not only as to that part of the premises, but also for the part of which complainant was in possession. There was no occasion, it is said, for complainant coming into a court of equity, as the question of title might have been settled in an action of ejectment for the land occupied by the boom. There is some force in the objection. But the part used for the boom is a very small part of the premises in controversy. It is the part covered by the waters of the Tittabawasse River, with a foot path on the bank — the premises in controversy being bounded by and lying on the south side of that river. Complainant was in possession of all except the bed of the stream and footpath on the bank of the river; and the title being one and the same, there would seem to be no good reason for dismissing the bill, or excepting the bed of the stream from the decree. What good would come of an action of ejectment for this part of the premises? There is no question as to complainant's title. We have already decided that point. It is no longer open to controversy; and to send the parties to law would only be attended with a bill of expense, an evil in itself. In such circumstances we think the Court was warranted in extending the relief to the premises occupied by the boom. If the position of the parties as to possession was reversed, the case might be different. The bill might be dismissed generally, or as to part only, or it might be retained with instructions to complainant, to bring ejectment for the part in possession of defendant.

But a court of equity cannot go further, and inquire into

Digitized by Google

the rents and profits of the boom. This would involve a new inquiry. The question would no longer be one of title — almost the sole inquiry in bills of this description — but one of damages for a wrongful possession. It would be substituting a bill in equity to remove a cloud on one's title, for an ejectment and action at law for mesne profits. The wrongful possession of the boom by defendants was the possession of trespassers, for which complainant has a remedy at law, and not the possession of trustees for which they may be called to account in equity.

Newell Barnard is a brother of J. L. Barnard, and is charged in the bill with combining and confederating with others to defraud complainant; and the evidence shows him deeply implicated in the fraud attempted to be practiced on complainant.

The decree of the Circuit Court as to John L. Barnard and Newell Barnard is affirmed, so far as it relates to the release from John L. Barnard, the injunction, and costs in the Court below, and reversed as to the rents and profits of the boom. Neither party to recover costs in this Court against the other. And so much of the decree as affects the defendants Avery, Eddy and Murphy, or either of them, is reversed, and the bill as to them is dismissed, with the costs of both Courts.

CHRISTIANCY and CAMPBELL JJ. concurred.

MARTIN CH. J. was absent.

Philip Farrell v. Elisha Taylor.

Common law certiorari where there is a statutory remedy.—The allowance of a writ of certiorari by a proper officer, to remove proceedings into the Supreme Court, is not conclusive upon that Court, and the writ may be dismissed if improvidently issued.

The power of the Supreme Court to review the decisions of inferior tribunals on certiorari, is one to be sparingly exercised in cases where other adequate

Digitized by Google

remedies can be had; and where a decision can be taken up by appeal, and on that appeal the jurisdictional questions, as well as those arising on the merits, can be fully disposed of, a certiorari should not be allowed, unless circumstances exist which show that a failure of justice will result from denying it.

Where, therefore, summary proceedings were had under the statute to recover possession of lands, and judgment rendered for the complainant; and the defendant, instead of appealing to the Circuit Court, procured the allowance of a common law certiorari removing the proceedings to the Supreme Court; and it appeared that the defendant had no claim to any equitable consideration from the Court, it was held that, although the Court had power to review the proceedings in this mode, yet, under these circumstances, the writ should be dismissed, with costs, as improvidently issued.

Heard October 28th. Decided December 5th.

Certiorari to a circuit court commissioner for the county of Wayne.

J. E. Bigelow, for plaintiff in error.

D. C. Holbrook, for defendant in error.

CAMPBELL J.:

Taylor having recovered a judgment of restitution against Farrell, as holding over after a mortgage foreclosure (the proceeding having been had under the statute giving a summary remedy in such cases), a certiorari was issued to the circuit court commissioner, to review his action.

We intimated upon the argument a doubt whether the writ ought to be retained for such a purpose, and, upon further consideration, are satisfied that it should be quashed, as improvidently issued.

It was claimed on the argument, that the allowance of the writ by a proper officer is conclusive upon this Court. Such is not the practice. In the case of *Lantis and others*, 9 *Mich.* 324, it was held that the propriety of the allowance is always open to examination by the Court itself. The writ is not of right, but is granted under discretion; and to allow a single judge, or a person not a member of the Court, to bind it in advance, would be to take away the authority of the Court itself. Unless the writ is granted

Digitized by Google

by the Court in the first instance, the propriety of its allowance will be considered on motion to dismiss, or on the hearing.

That the Court has jurisdiction to issue this writ, as a matter of judicial power, we think is established by the weight of authority. The case of *The People v. Farwell*, 4 *Mich.* 556, denied such a power to the Circuit Courts, when an appeal lay to those courts from the same judgment which had been taken up by certiorari. Without inquiring into the grounds of that decision, we think the appellate jurisdiction of this Court over inferior tribunals not proceeding according to the course of the common law, is granted by the Constitution in terms broad enough to reach the case. But, while the power exists, it has been considered as one which should be exercised sparingly, in cases where other adequate remedies can be had; and, where a decision can be taken up by appeal, and on that appeal the jurisdictional questions, as well as those arising on the merits, can be fully disposed of, a certiorari should not be allowed, unless circumstances exist which show that a failure of justice will result from denying it: — *Savage v. Gulliver*, 4 *Mass.* 178; *Storm v. Odell*, 2 *Wend.* 287; *Comstock v. Porter*, 5 *Wend.* 98; *People v. Supervisors of Queens County*, 1 *Hill*, 195; *People v. Covert*, 1 *Hill*, 674; *Matter of Mount Morris Square*, 2 *Hill*, 14. The appeal in these cases covers the jurisdiction as well as allowing a rehearing on facts: — *Sallee v. Ireland*, 9 *Mich.* 154. The object of allowing the summary jurisdiction, against tenants and others holding over after their rights have been determined, was to prevent the injustice which would arise, were persons who have entered into land, under circumstances binding them to restore it promptly, to be allowed to retain possession, without color of title, from those owning the title by means of which they got that possession. There are many cases where delay is ruinous; and it would usually be unjust, where there is no

Digitized by Google

security of payment for the use of the premises by the tenant holding over. The statute has made it a condition of an appeal that security be given for rent as well as costs:—*Comp. L.* §4998. If a certiorari is to be allowed instead of an appeal, the tenant, if irresponsible, may continue his occupancy at the landlord's expense, until the case is determined in this Court. Such injustice should not be countenanced by any Court; and to permit such proceedings to be resorted to, without strong circumstances showing the danger of losing a meritorious case unless such permission is granted, would encourage, instead of preventing injustice.

We have looked into the facts of this case, for the purpose of discovering whether any reason exists for relaxing the rule in the present instance. We find that the commissioner had evidence before him justifying his conclusion that Farrell went into possession under Neveux, who had previously given the mortgage which Taylor has foreclosed. Neither Neveux nor Farrell had acquired any other title or pretense of title. Taylor has acquired the only other title which is shown to exist; but is not debarred thereby from relying on this mortgage title, which has been accompanied by the mortgagor's possession, in person, and by Farrell his tenant. Upon the mortgage foreclosure the statute gave Taylor a right to this summary remedy against any person in possession, where such possession has been only under the equity of redemption.

Farrell has no claim to any equitable consideration from the Court; and, if he has lost his appeal, no injustice has been done, whether the complaint was or was not regular; a question we do not propose to consider upon this hearing.

The writ must be quashed, with costs, as improvidently issued.

MANNING and CHRISTIANCY JJ. concurred.

MARTIN CH. J. was absent.

Digitized by Google

Orrin P. Ramsdell v. Alexander Eaton & others.

Parties to foreclosure suit. The description of premises in a mortgage was erroneous in one particular, and a person was made defendant in a suit to foreclose it as a subsequent purchaser or incumbrancer, who owned land which might be interfered with by the erroneous description, but who had never been incumbrancer or owner of the mortgaged premises as identified by the proofs. It was held that he was improperly made a party, and the bill as to him was dismissed.

Abbreviated names: allegation of identity. A mortgage was given by "Alexander Eaton, Junior" to "O. P. Ramsdell." A bill was filed to foreclose it, by *Orrin* P. Ramsdell against Alexander Eaton. The bill was in the usual form, but contained no allegation that the parties to the suit were identical with the parties to the mortgage. Eaton suffered the bill to be taken as confessed; but a successful defense being interposed by another defendant who was improperly made a party, the Court dismissed the bill as to all, for want of such allegation of identity. Held that this was erroneous. The question of identity was open to proof, if disputed, and the *pro confesso* admitted it as against the mortgagor.

Heard October 16th. Decided December 5th.

Appeal from Saginaw Circuit in Chancery.

The bill was filed by Orrin P. Ramsdell against Alexander Eaton, Louisa P. Eaton and Moses B. Hess, to foreclose a mortgage signed by "Alexander Eaton, *Junior*," and Louisa P. Eaton, his wife, and given to "O. P. Ramsdell," upon premises described as "The east twenty feet of the west half of lot twelve in block eighteen; that is to say, commencing sixty feet from the north-east corner of lot twelve on Plank Road street, thence northerly sixty feet to the line between lots eleven and twelve, thence westerly on said line twenty feet, thence southerly sixty feet to the Plank Road street, thence easterly on the line of Plank Road street twenty feet to the place of beginning. In the village of East Saginaw." Hess was made defendant by the general allegation, as a subsequent incumbrancer or purchaser. There was no direct averment in the bill that Orrin P. Ramsdell, the complainant, was identical with O. P. Ramsdell, the mortgagee, or that Alexander Eaton, Junior, was identical with Alexander Eaton. Eaton and his wife suffered the bill to be taken as confessed, but Hess defended.

Digitized by Google

It appeared from the evidence that "The east twenty feet of the west half of lot twelve in block eighteen" was the land intended to be mortgaged, but that the lines given by the remainder of the description in the mortgage would not embrace this, and would include lands owned by Hess. Hess had never had any interest in the first mentioned description, and his defense was, that he did not claim his own land through the mortgagors or either of them, and that neither of them had ever had any interest in it.

The Court below dismissed the bill, not only as to Hess, but also as to the Eatons.

Walker & Kent for complainant.

W. L. Webber, for defendant Hess, argued that there was a variance between the mortgage described in the bill and the one offered in evidence. The names being different, the Court could not presume the parties to be identical:—11 *Wend.* 522; 10 *Paige*, 170; 4 *Pick.* 497; 14 *Pick.* 212; 18 *Pick.* 455; 17 *Pick.* 200; 3 *Met.* 330; 10 *Mass.* 203; 2 *Cai.* 165. Also, that on a simple foreclosure bill, containing no allegation of error or mistake, the Court could not correct the mistake in the description of land: 17 *Johns.* 146; 8 *Wend.* 183; 5 *Wend.* 142; 7 *Ohio, N. S.* 99; 1 *Greenl. Ev.* § 301; 3 *Mich.* 172; 4 *McLean*, 481; 10 *Ohio*, 433; 11 *Barb.* 173; 4 *B. & Ad.* 787; 5 *B. & Ad.* 43; *Wal. Ch.* 172.

CAMPBELL J.:

The bill in this cause was filed to foreclose a mortgage given upon a parcel of land, the description of which, when applied by testimony to the land, was found to contain one erroneous point of departure. It was given to "O. P. Ramsdell" and signed "Alexander Eaton, Jr.," Defendant Hess was made a party as claiming as

Digitized by Google

a subsequent incumbrancer or purchaser. He answered, and upon testimony taken it appeared that he was the owner of the east half of lot twelve in block eighteen, and that Alexander Eaton never owned or claimed that portion of the lot. The evidence showed that Eaton owned the easterly twenty feet of the west half, and the only ambiguity which rendered this inquiry material, was in making a starting point of a point sixty feet from the northeast, instead of the southeast corner, which would, if followed, have interfered with Hess's right, but which the case shows clearly to have been a clerical error. The Court below dismissed the bill without prejudice, as against all of the defendants, although it had been taken as confessed against all but Hess. This dismissal as to the others was based on a supposed variance between the names of the parties to the bill and the parties to the mortgage, there being no allegation of identity. Complainant appeals.

So far as Hess is concerned the bill was properly dismissed. There is no evidence tending to show that he was properly brought in as an incumbrancer or owner of the mortgaged premises, as identified by the proof. He is entitled, therefore, to an affirmance of the decree, with costs.

The bill having been taken as confessed as against the other defendants, and the identity of the parties being open to proof if questioned, it must be assumed that it is admitted by the pro-confesso that defendants executed to complainant the mortgage set forth in the bill. As between the parties this is sufficient, and it does not concern Hess if he is not retained as a defendant.

The decree must be affirmed with costs as to Hess, and reversed as to the other defendants. A decree must be entered in the usual form for a foreclosure and sale, to satisfy the sum of $641.85, with interest at 10 per cent.

Digitized by Google

from April 26th, 1862, unless paid within ninety days, together with costs of the Circuit Court. As Eaton and wife have not defended in either Court, complainants are not entitled to costs on appeal against them.

MANNING AND CHRISTIANCY JJ. concurred.

MARTIN CH. J. was absent.

Esther F. Thomas v. Richard D. Sprague.

Recovery against garnishee on evidence contradicting his.—A recovery can not be had against a garnishee on evidence contradicting his own statement that nothing is due from him to the principal debtor. Newell v. Blair, 7 Mich. 103.

Finding of facts must state conclusions.—A finding of facts by a Circuit Judge must state the conclusions of fact. If it set forth only the evidence, it is insufficient. Trudo v. Anderson, 10 Mich. 357.

Heard November 5th. Decided December 5th.

Error to Ionia Circuit. The only error assigned was, that the finding of facts by the Circuit Judge did not sustain the judgment. The following was the finding:

"Case under Chapter 141 of Compiled Laws, entitled 'Of proceedings against Garnishees.'

"On the 4th day of September, 1862, the said Richard D. Sprague commenced suit by summons, against one Parker A. Sprague, before Wm. W. Mitchel, Esq., a justice of the peace of said county, and on the 13th of same month obtained judgment in the sum of ninety-nine dollars damages and one and 27-100 dollars costs of suit.

"On the said 4th day of September, this suit was commenced before the same magistrate—the said plaintiff alleging that the said defendant was indebted to the said Parker A. Sprague, &c. Issue was joined, and such proceedings were had thereon that judgment was rendered

Digitized by Google

in favor of this plaintiff and against this defendant, for fifty dollars damages and five dollars costs. From which judgment the said defendant took an appeal.

"On the trial in this Court the above facts were admitted, and the docket of the magistrate, of the two above cited cases, was received and read in evidence: the minutes of the examination of the defendant herein, the garnishee, as sworn to, and reduced to writing by the magistrate on the trial below, were also received and read in evidence. Said minutes read as follows, to-wit: 'Esther F. Thomas being duly sworn, says she is acquainted with Parker A. Sprague, and that she made a contract with the said Parker A. Sprague for building a house the fore part of June last, and was to pay him $1,250. I recollect when the garnishee summons was served on me. When I went east there was $250 due on the contract, which was on the 20th of August; I returned on the 4th of September, and the garnishee summons was served on me that day. I had not paid any portion of the $250 due on the contract, prior to the service of the garnishee summons. Sprague told me the 4th of September, 1862, a short time after the summons, that Newland and he had completed that matter, and he had sold out to Newland his interest in that contract: the first knowledge I had of the sale from Sprague to Newland was after garnishee summons.'

"On the trial in this Court, Mrs. Thomas was called as a witness; was sworn, and testified, among other things, as follows: 'I contracted with Parker A. Sprague to build me a house, for $1,250, payable as the work progressed; and as he required money to lay out for materials, I was to advance it. He commenced and went on with the building; I made payments as materials were wanted and the work progressed; did so till I went east, August 20th, and at that time I had paid him $1,000. It was conceded that the $1,000 paid up for materials and work to that date. I left home August 20th; returned Septem-

Digitized by Google

ber 4th. How much work had been done, and what value in materials furnished, between August 20th and September 4th, I don't know. The job was not done. When I said in my statement before the magistrate, that when I went east there was $250 due on the contract, I meant this: that I was liable to pay $250 more when contract was fulfilled.'

"There was testimony in the case from other witnesses, showing that the said Parker A. Sprague had furnished materials, and done work under the contract, between August 20th and September 4th, date of service of garnishee summons, to the amount of $50, and that this amount was due and payable to him at date of said service, by the terms and conditions of said contract. There was some testimony introduced for the purpose of showing that the said Parker A. had a partner in this job, to-wit: one Newland, and that he had sold out and assigned to said Newland all his interest in said job prior to service of garnishee summons. But the testimony did not establish any such copartnership, or sale and assignment.

"The defendant herein is entitled to her costs, and the plaintiff to a judgment for the balance of the fifty dollars. And the costs having been stipulated at the sum of $29 43, this amount is to be deducted from the fifty dollars, and judgment to be rendered for the balance, to-wit: the sum of $20 57."

D. W. Jackson and *A. Williams*, for the plaintiff in error, cited to the point that the finding was insufficient, because only giving the evidence, and not drawing conclusions of fact: — *Trudo v. Anderson*, 10 *Mich.* 357. That judgment was erroneously rendered against the garnishee after she had sworn that nothing was then due from her: — *Newell v. Blair*, 7 *Mich.* 103.

Digitized by Google

A. W. Dodge and *C. I. Walker*, for defendant in error:

The plaintiff in error admits her liability, but not knowing the extent of it, further inquiry of other witnesses might be had to show to what extent she was liable:— *Maynards v. Cornwell*, 3 *Mich.* 313; *Newell v. Blair*, 7 *Mich.* 103.

CAMPBELL J.:

Sprague, the defendant in error, having garnisheed Mrs. Thomas, the plaintiff in error, as a debtor of one Parker A. Sprague, and she having answered, a judgment was finally rendered against her, from which she appealed to the Circuit Court for the county of Ionia. The appeal was heard in that Court, in February, 1863, and decided in April. Proceedings were stayed until thirty days after a written finding should be filed.

A written finding was filed July 7, and a new judgment was entered thereon, the first judgment having been informal. Error is now brought, and the ground of error assigned is, that the finding does not support the judgment.

So far as any facts can be regarded as set forth in this finding, it appears that the garnishee denied in the Circuit Court that any thing was then due from her, and that the only foundation for a recovery was derived from the evidence of other witnesses, who testified that money was due from her under a contract which she testified had not matured. We held in *Newell v. Blair*, 7 *Mich.* 103, in conformity with previous rulings, that the garnishee could not be held on testimony contradicting her statement.

We do not think, however, that the finding is sufficient in itself upon any grounds. When a finding of facts is required, it should state something more than evidence; it should state conclusions of fact:— *Trudo v. Anderson*, 10 *Mich.* 357.

The Court did not find what contract was made between

Digitized by Google

Mrs. Thomas and Parker A. Sprague, nor what moneys were due on it, nor whether it had been in whole, or how far performed according to its terms. There is nothing to show a foundation for any legal conclusion. The finding not setting forth facts which would sustain a judgment for plaintiff below, the defendant was entitled to judgment for costs.

Judgment must be reversed, and judgment entered for plaintiff in error for costs of both Courts.

MANNING and CHRISTIANCY JJ. concurred.

MARTIN CH. J. was absent.

The Niagara Fire Insurance Company v. Henry DeGraff.

Insurance of liquors.—Spirituous liquors illegally kept for sale may, notwithstanding, be lawfully insured against destruction by fire. The risks insured against are not the consequences of illegal acts, but of accidents.

Description of insured property. Where an insurance was effected on "groceries," and there was evidence that the insurer was informed that alcohol and spirituous liquors constituted a part of the stock, it was held that whether they were included in the term "groceries" in the policy was a question of fact for the jury.

Conditions in policy. A policy of insurance against fire provided that the policy should be void if the premises were used for storing or keeping therein any articles included in certain classes of hazards annexed to the policy, "except as herein specially provided, or hereafter agreed to by [the insurers] in writing upon this policy." It was held that where a stock was insured under the general designation of "groceries," which included some of these hazardous articles, the insurance by this designation *did* specially provide for them "in writing upon the policy."

A clause in a fire policy which provided that, if gunpowder or other articles subject to legal restriction should be kept in greater quantities or in a different manner than was provided by law, the policy should be void, was held to have reference only to articles of an intrinsically dangerous nature as liable to cause injury accidentally or by carelessness, and not to refer to liquors, the traffic in which was made illegal by statute.

Inconsistent instructions to the jury. A judgment will not be reversed because inconsistent instructions were given to the jury, if those adverse to the plaintiff in error were all correct.

Verdict against evidence. The question whether the jury did not find against evidence or perversely, cannot be considered on writ of error.

Heard November 3rd. Decided December 5th.

Digitized by Google

NIAGARA FIRE INSURANCE CO. v. DEGRAFF.

Error to Lenawee Circuit.

The plaintiffs in error insured DeGraff "against loss or damage by fire to the amount of $1,500, as follows: $500 on dry goods contained in the wood building occupied by assured; $200 on groceries; $100 on hardware; $100 on boots and shoes; $50 on crockery; $50 on hats and caps; all contained in the wood store on south side of Main street, village of Palmyra; $500 on dwelling house." The policy provided that if the premises "shall be used for the purpose of carrying on therein any trade or occupation, or for storing or keeping therein any articles, goods or merchandise, denominated *hazardous* or *extra hazardous*, or *specially hazardous*, in the second class of the classes of hazards attached to this policy, except as herein specially provided for, or hereafter agreed to by this corporation, in writing upon this policy, from thenceforth, so long as the same shall be so used, this policy shall be of no force or effect." "Whenever gunpowder, or other article subject to legal restriction, shall be kept in said premises, in quantities greater than the law allows, or in a manner different from that prescribed by law, unless said use or keeping is specially provided for herein, this policy shall be null and void."

Attached to the policy was an enumeration of "*classes of hazards.*" In the second class were enumerated as follows:

Hazardous No. 2. China or earthenware, grocers' stocks, gum shellac, oil, provisions, *spirituous liquors*, sugars, sulphur, tallow, &c.

Extra hazardous No. 2. *Alcohol*, apothecaries stocks, &c.

There was no indorsement upon the policy, and no special provision in it, assenting in terms to the keeping by DeGraff of gunpowder, drugs and medicines, spirituous liquors or alcohol.

The action was brought to recover the insurance upon the goods, which had been destroyed by fire. By the bill

Digitized by Google

of exceptions settled in the case, it appears that on the trial it was proved on the part of the plaintiff, that at the time of the issuing of the policy, and from that time to the time of the fire, he was engaged in the business of a retail country store at Palmyra; that his stock consisted of dry goods, groceries, crockery, and hardware, boots and shoes, hats and caps, together with a small amount of drugs and medicines, consisting chiefly of pills, plasters, patent medicines, roots and barks. He also kept alcohol for sale to the amount of not exceeding a barrel, and also a few bottles of spirituous liquors sealed up in bottles, for sale at retail by the bottle.

The plaintiff also gave evidence tending to show, and which he claimed did show, that at the time he made application for the insurance he told the agent of the defendant who issued the policy, that he wanted an insurance on his stock of goods which he described; that he informed the agent, among other things, in answer to a question by him, that he kept alcohol and spirituous liquors as aforesaid; that said agent then drew up the application and that the plaintiff signed it; which statement was denied by the testimony of the agent, R. B. Robbins, who testified that he was not informed by the plaintiff that alcohol or spirituous liquors were kept for retail in said store.

For the defense the Judge was asked to charge the jury: That the articles of alcohol and spirituous liquors (since the Prohibitory Liquor Law, forbidding all persons from selling or keeping for sale spirituous or intoxicating liquors,) are not included in the term "groceries" as used in referring to goods kept for sale. The Judge refused so to charge, but charged the jury that that question was a question of fact for the jury. He also, at the request of the plaintiff, further charged, that by the conditions attached to the policy, the keeping of alcohol is no more prohibited than sugars, provisions or tallow, if it constitute a part of

Digitized by Google

an ordinary grocer's stock; that the enumeration of oils, gum shellac, provisions, sulphur, tallow, *alcohol*, &c., in the conditions attached to the policy, together with grocers' stocks, does not make it necessary to specify such things when an insurance is being taken on the stock itself, when they constitute a part thereof. In other words, the insurance of a stock of groceries is an insurance of everything commonly kept and sold under that head, and the insurer is apprised, by an application for insurance on groceries, that the insured keeps or may keep any and all of the articles commonly kept and sold under the denomination of groceries; otherwise an insurance on a stock of groceries would be an insurance conditioned to be void if certain prominent articles of groceries were kept: that if the articles above enumerated, or any others denominated hazardous or extra hazardous in the conditions, are commonly kept and sold as a part of a grocer's stock, then in insuring a stock of groceries, the hazard from keeping those articles is charged and paid for, and the risk thereon assumed by the insurer, whether the insurer was specially informed of those articles constituting a part of the stock or not, unless there was a concealment on the part of the insured.

The counsel for the plaintiff further requested the Judge to charge the jury, that the keeping of a small quantity of gunpowder for retail, as part of plaintiff's stock, would not render the policy void; which request was refused. The counsel for the plaintiff also further requested the Judge to charge the jury each of the following several propositions:

1. That the keeping of a small quantity of alcohol or alcoholic liquors for retail as a part of his stock would not render the insurance void.

2. That if the jury find that alcohol and alcoholic liquors, gunpowder, and drugs and medicines, in moderate quantities, for retail, usually constitute part of a stock of groceries in such a store as plaintiff's, the fact that plaintiff

Digitized by Google

so kept them as part of his stock would not render his policy void.

3. That if the jury find that the plaintiff, at the time of applying for his insurance, omitted to disclose the fact that he kept in his stock any of the articles above mentioned, that would not render his policy void unless he knew that the fact of keeping them would have a tendency either to prevent his getting the insurance or to make the rate of premium higher, and concealed the fact with fraudulent intent.

4. (If the Court should hold that the keeping of alcohol or alcoholic liquors for sale by plaintiff was illegal, and that the insurance thereof was on that account void — then) That the illegality of keeping such liquors would not affect the insurance upon the remaining portion of the stock.

5. That the provision in the policy against storing or keeping in the premises mentioned therein, certain hazardous articles therein referred to, is not to be construed as prohibiting the keeping of a small quantity of any of the articles which usually constitute a stock of groceries in a country store, where the storing or keeping of such articles is not the principal business to which the premises are devoted, but the same are only kept for retail as part of a general stock.

All of which requests were refused. But the Judge did charge, at the request of the counsel for plaintiff, that whether the agent was actually informed by DeGraff that he kept a small quantity of alcohol and liquors sealed up in bottles as a part of his stock, as testified to by DeGraff, was a question of fact for the jury.

The Judge further, at the request of the counsel for the defendants, instructed the jury as follows:

1. That the keeping alcohol for sale in the store where the goods were kept was in violation of the conditions of the policy; and if the jury believe that alcohol was so kept

Digitized by Google

before and at the time of the fire, the plaintiff cannot recover.

2. That the keeping of drugs and medicines in the store where the goods were kept was in violation of the conditions of the policy; and if the jury believe that drugs and medicines were so kept before and at the time of the fire, the plaintiff cannot recover.

3. That the policy insuring specific articles under the different heads of dry goods, groceries, hardware, crockery, boots and shoes, hats and caps, authorizes the keeping of those prohibited articles only which come under these specific classes.

4. That the term 'groceries' applied to property insured as in this case, is not to be presumed to apply to any articles kept for an illegal purpose, or to operate as an express assent to a waiver of the conditions annexed to the policy.

5. That the conditions of the policy, as well as the conditions annexed to the policy, are by operation of law made express warranties, and any violation of them or any part of them, whether accompanied by fraud or not, renders the policy void, and the plaintiff cannot recover.

6. That this policy, insuring specific classes of articles, and not by its terms including the stock of a country store, does not authorize the keeping of any articles prohibited by the policy not included in any of those specific classes, because of their being usually kept in a country store.

7. That the provision of the policy, "Whenever gunpowder or any other article subject to legal restriction shall be kept in said premises in quantities greater than the law allows, or in a manner different from that prescribed by law, unless said use or keeping is specially provided for herein, this policy shall be null and void," prohibits the keeping of spirituous liquors or alcohol for sale contrary to the provisions of the Prohibitory Liquor

Digitized by Google

Law, and if the jury find they were so kept, the plaintiff cannot recover.

The jury returned a verdict for the plaintiff.

C. A. Stacy and *C. I. Walker* for plaintiff in error.

1. The Court is bound to construe the contract for the parties so as to give every part full effect. Neither the Court nor jury can make a contract for the parties.

2. The Court erred in refusing to charge that alcohol and spirituous liquors were not included in the term groceries since the Prohibitory Liquor Law.

No policy is to be presumed to include articles that are prohibited to be sold or kept:—1 *Phil. on Ins.* 81; 15 *Gray*, 492.

Even if the policy expressly covered these articles, then insurance would be against the policy of our law, and the policy would be void.

Though the term groceries, before the Prohibitory Liquor Law, might be construed to include alcohol or liquors kept for sale, because the term was held by lexicographers to include it, or because customary to be kept, yet neither a definition founded on previous law, or custom arising from a knowledge of previous law, can control now. But here there was no proof of any such custom.

3. Conditions in a fire policy, no less than in a marine policy, not complied with, defeat the policy, whether material to the risk or not, or whether the non-compliance be with or without the act or privity of the assured:—*Phil. on Ins.* 410; 6 *Cow.* 673; 6 *Wend.* 488, 494; 7 *Wend.* 72; *Ibid.* 270; 5 *Hill*, 193; 3 *Hill*, 501; 10 *Mich.* 279.

4. But it may be said that the charge of the Court was, after all, in our favor, upon these points. To this we say, the charges made by the Court contradicted those charges in our favor. The effect to the jury of the charge, by request of defendant in error, that the

Digitized by Google

enumeration of oil, sugar, alcohol, &c., in a grocer's stock does not make it necessary to specify those articles when insurance is being taken on a stock of groceries, but they are insured as a part thereof, was to neutralize the other charge, and destroy its effect.

The charge must be rational and consistent. If absurd, impossible or contradictory, the party aggrieved by it will be entitled to a new trial:—3 *Graham on New Trials*, 800; 6 *Cow.* 482.

Such a charge would either be a nullity, or, if it had any effect, would be calculated to mislead the jury. The jury must not be misled by the Court in any manner:—18 *Maine*, 436.

Whether, therefore, they are induced to find a wrong verdict by a positive direction, or by being left to draw an erroneous conclusion from the proof, there is the same ground for a new trial:—3 *Graham New Trials*, 774; 11 *Wend.* 83.

A. L. Millerd, *H. D. Condict* and *T. M. Cooley* for defendant in error:

1. The Judge was correct in holding that whether alcohol and spirituous liquors were included in the term *groceries* as insured was a question of fact.

The common understanding of those who enter into these contracts is to govern the construction of the words employed, and this understanding is to be submitted to the jury as a question of fact:—4 *T. R.* 206; 2 *Johns.* 531; 7 *Johns.* 385; 7 *Cow.* 202; 2 *C. & P.* 525; 9 *Met.* 354; 3 *Sandf.* 26; 8 *Wend.* 160; 10 *Exch.* 323; 11 *Exch.* 405; 5 *M. & W.* 535; *Ry. & M.* 75; 7 *Bing.* 787; 5 *B. & P.* 213; 3 *B. & Ad.* 728; 3 *M & G.* 759; 1 *Q. B.* 424; 2 *C. B.* 412; 3 *Camp.* 16; 3 *Esp.* 121; 3 *Johns.* 88.

The evidence adduced upon this point seems to have been entirely satisfactory to the jury, but in fact, we

Digitized by Google

apprehend, no evidence was necessary, as the ordinary meaning of the term *groceries* would include these articles:—*See Webster and other lexicographers;* 6 *Wend.* 623.

But defendant's position was, that, though the term groceries had this extent before the liquor law, it cannot be so understood since the sale of alcohol is prohibited. To this we reply,

The question is simply as to the meaning of a word. We see nothing in the statute which undertakes to change definitions. The statute simply prohibits the sale of an article of groceries. The word embraces what it did before.

But the position of defendants is faulty, in that it asks the Court to determine *as matter of law* that the parties used the term *groceries* in a particular and restricted sense. Now we say this is not a question of law at all, but one of fact. To enable the jury to determine it, evidence was given. As a part of the evidence, it was shown that the insurers were informed when they made out the policy that alcohol constituted a part of the stock. The jury have passed upon the question as one of fact, and found that the term *groceries* was here used by the parties in its former and general sense.

Alcoholic liquors may still be insured notwithstanding the statute prohibits their sale. The statute does not make them any less *property* than they were before. They are subject to the incidents of property, protected as such:—1 *Gray*, 46.

And if the law will defend the owner's possession of the property, and compel compensation for its destruction, it certainly cannot be illegal for him to indemnify himself against accidental destruction, by insurance.

There is no analogy between the cases of marine insurance held void because the ventures were illegal, and the case of insurance on property the sale of which is prohibited.

Digitized by Google

NIAGARA FIRE INSURANCE CO. v. DEGRAFF.

A marine insurance on an unlawful voyage is void, either, *first*, because the purpose and object of the insurance are a violation of the law, or, *second*, because, the voyage being unlawful, the assured has no insurable interest.

To make the case of a fire insurance on property not allowed to be sold analogous to this, the insurance must be *against the consequences of a breach of the law.* If the policy were *conditioned* for an unlawful sale, and provided an indemnity against penalties and costs that might be imposed in consequence, it would be analogous, and clearly illegal.

This policy does not provide for a *sale* of the alcohol. A man might lawfully keep the article for his own use, and, having it, might insure it. If he made an illegal sale of it afterwards, this illegality would not defeat an insurance valid in its inception: —1 *Story*, 109; 3 *Harr.* 484.

The offense of *keeping for sale* was complete before the policy attached. The insurance therefore did not *induce* it. The policy could have had nothing to do with that breach of the law. It related only to plaintiff's lawful interest in the property, and could not be affected by any offense already committed. It is an established principle of marine insurance that a policy is never affected by a prior and distinct illegality: — *Duer on Ins.* 340, 362; 8 *T. R.* 562; 1 *B. & P.* 353; 13 *Pet.* 163; 11 *Wheat.* 258, 271, 275.

But even if the illegality of the trafic should be held to render the insurance of the prohibited articles void, it would not affect it as to the residue of the stock: —4 *Taunt.* 792; 1 *Stark.* 222; 6 *Taunt.* 498; 2 *Marsh.* 196; 4 *Rob.* 166.

2. Where one applies for an insurance on a stock of groceries, he thereby sufficiently apprises the insurer that he keeps, or may keep, as a part of that stock, the articles commonly constituting a grocer's stock: — 14 *Barb.* 383;

Digitized by Google

1 *Bosw.* 522; 17 *N. Y.* 194; 22 *N. Y.* 441; 17 *N. Y.* 200; 10 *Rich.* 209; 2 *Hall*, 589, 622.

3. It is a general principle, applicable to policies of insurance, that the stipulations inserted therein for the benefit of the insurers, shall be construed most strongly against them: — 1 *Sum.* 434; 5 *Ind.* 23; 32 *Penn.* 351.

This principle will apply to all the conditions of this policy in regard to hazardous articles. Whenever there can be any doubt upon the construction of any of them, the insured should have the benefit of that doubt. It was the duty of the insurers, when fully informed of the facts, to so frame the policy that plaintiff's stock should be effectually insured; and they cannot take advantage of defects in their own statements to defeat an insurance for which the plaintiff has in good faith paid, relying upon them to perfect the papers: — 17 *N. Y.* 194; 16 *B. Monr.* 258; 14 *Barb.* 383; 2 *Hall*, 689.

CAMPBELL J.:

Plaintiffs in error insured DeGraff upon his stock of goods, described in his application as a "stock of dry goods, groceries, &c.," dividing the risk into specific sums on dry goods, groceries, hardware and other things specifically mentioned. There was evidence tending to show that he had in his store a few bottles of spirituous liquors, and a barrel of alcohol. Alcohol was among the articles mentioned in the second class of hazards in the second sub-division of extra hazards. Grocers' stocks generally were in the first sub-division of the same class. Bottled spirituous liquors were not classed as extra hazardous, but were included in the first class of ordinary hazards in the second division of hazardous. There was evidence tending to show that the insurance agent who drew up the application was informed of the presence of the liquors and alcohol, which was however denied by the agent. The property being destroyed, a suit was brought on the policy,

Digitized by Google

and judgment was recovered. Error is brought on the rulings upon the trial. The points taken refer mostly to a clause in the policy which declared that if the store should be used "for storing or keeping therein any articles, goods or merchandize, denominated hazardous, or extra hazardous, or specially hazardous, in the second class of the classes of hazards annexed to this policy, except as herein specially provided for, or hereafter agreed to by this corporation, in writing upon this policy, from thenceforth, so long as the same shall be so used, this policy shall be of no force or effect." There was a further clause annuling the policy whenever gunpowder or any other article subject to legal restriction should be kept in greater quantities or in a different manner than prescribed by law.

The Court below refused to charge, as requested, that since the passage of the Prohibitory Liquor Law, alcohol and spirituous liquors are not included in the term "groceries" as used in referring to goods kept for sale; and charged that the question whether they were so included was one of fact for the jury. To this exception is taken.

It was claimed on behalf of the plaintiffs in error, that if these liquors can be allowed to be included in a policy, the policy will be to all intents and purposes insuring an illegal traffic; and several cases were cited involving marine policies on unlawful voyages, and lottery insurances, which have been held void on that ground. These cases are not at all parallel, because they rest upon the fact, that in each instance, it is made a necessary condition of the policy that the illegal act shall be done. The ship being insured for a certain voyage, that voyage is the only one upon which the insurance would apply, and the underwriter becomes thus directly a party to an illegal act. So insuring a lottery ticket requires the lottery to be drawn in order to attach the insurance to the risk. If this policy were in express terms a policy insuring the party selling liquors against loss by fine or forfeiture, it would be quite

Digitized by Google

analogous. But this insurance attaches only to property, and the risks insured against are not the consequences of illegal acts, but of accident. Our statute does not in any way destroy or affect the right of property in spirituous liquors, or prevent title being transmitted, but renders sales unprofitable by preventing the vendor from availing himself of the ordinary advantages of a sale, and also affixes certain penalties: — *Hibbard v. People*, 4 *Mich.* 125; *Bagg v. Jerome*, 7 *Mich.* 145. If the owner sees fit to retain his property without selling it, or to transmit it into another State or country, he can do so. By insuring his property the insurance company have no concern with the use he may make of it, and as it is susceptible of lawful uses, no one can be held to contract concerning it in an illegal manner unless the contract itself is for a directly illegal purpose. Collateral contracts, in which no illegal design enters, are not affected by an illegal transaction with which they may be remotely connected. In the case of *The Ocean Insurance Co. v. Polleys*, 13 *Pet.* 157, an insurance upon a ship known by the insurance company to be liable to forfeiture under the registry laws of the United States, was held valid, and a recovery was permitted for a loss while sailing under papers known to be illegal. The case of *Armstrong v. Toler*, 11 *Wheat.* 258, is still stronger. It is difficult to preceive how public policy can be violated by an insurance of any kind of property recognized by law to exist.

The question then arises, whether the Court rightly left it to the jury to say, as a matter of fact, whether the term "groceries" included spirituous liquors and alcohol. That it may include them in the absence of such a statute is not denied; the recognized definitions embracing them clearly, so that it may be doubted whether it might not, in that case, require evidence of usage to exclude that meaning if such articles existed in an insured stock of groceries. See *New York Equitable Insurance Co. v. Lang-*

Digitized by Google

don, 6 *Wend.* 623. There was evidence before the jury in the case before us, that these things did in fact form a part of the stock, and evidence tending to show a knowledge of that fact by the agent. The statute does not prohibit the sale of all kinds of liquors, but, as to some, expressly recognizes the right in every one. Whatever may be the *presumption*, under our present statute, as to the extent of the term "groceries"—a question not raised in the case, and upon which, therefore, it would be improper to pass—we think the instruction asked was altogether too broad, in claiming that alcohol and other liquors could not possibly be included. The question was properly left to the jury.

If the jury found—as their verdict shows they must have done—that the term "groceries" included the liquors in question, then the other instructions complained of, which held that by insuring such a stock the liquors were embraced although extra hazardous, were clearly correct. By the use of a term including them they are "*specially provided for in writing on the policy.*" Insuring a class of goods includes what is usually contained in it, whether extra hazardous or not. See *Bryant v. Poughkeepsie Mutual Insurance Co.* 17 *N. Y.* 200; *Harper v. Albany Mutual Insurance Co.* 17 *N. Y.* 194; *Harper v. N. Y. City Insurance Co.* 22 *N. Y.* 441; *Delonguemare v. The Tradesmen's Insurance Co.* 2 *Hall*, 589. In these instructions the jury were directed to include the articles only if satisfied that they were commonly kept and sold as part of a grocer's stock. This qualification was sufficiently broad to prevent any improper inferences.

The clause of the policy vitiating it if gunpowder and other articles subject to legal restriction should be kept in greater quantities or in a different manner than is provided by law, was not pressed very strongly on the argument, and evidently refers only to articles of an intrinsically dangerous nature, as liable to cause injury accidentally or by

Digitized by Google

carelessness. It has no reference to any risks except such as render the property more likely to be destroyed. There are no statutory provisions concerning liquors analogous to the laws restricting the use of powder.

Our attention has been called to the fact, that the other charges given on the one side and refused on the other, are inconsistent with those complained of. So far as this is the case, however, they favored the plaintiffs in error, — those excepted to being the only ones which could damnify them. Had the verdict been for them, the discrepancies would have been more important in determining the rights of the other party. The question whether the jury did not find against evidence, or perversely, could only be presented in the Circuit Court.

The judgment should be affirmed, with costs.

MANNING J. concurred. CHRISTIANCY J. also concurred in the result.

MARTIN CH. J. was absent.

The Regents of The University of Michigan v. The Detroit Young Men's Society.

Pleadings: Execution of contract by agents.—Where a contract purported to be executed by agents of the respective parties, and it was set forth at length in the declaration, and alleged to be the contract of the parties, the declaration was held sufficient without showing how the agency was constituted.

Where agents executing an instrument on behalf of a corporation sign their own names and affix their own seals, such seals are merely nugatory, and the instrument is to be regarded as a simple contract, and, if otherwise valid, binding on the corporation as such.

Surplusage.—When a contract thus executed was declared upon as "sealed by the respective parties," and was then set forth in full in the declaration, it was held that the allegation that it was sealed by the parties should be rejected as surplusage. Any allegation in respect to the description or effect of an instrument thus set forth at length, in a matter which must appear upon its face as set forth, is superfluous, and should be treated as surplusage.

Digitized by Google

REGENTS OF THE UNIVERSITY v. DETROIT YOUNG MEN'S SOCIETY.

Profert.—In declaring upon a contract thus executed, it is not necessary to make profert. But if it were a sealed instrument, no further profert or oyer is necessary where it is thus set forth in full.

Interest: demand.—Where an action was brought for interest due on a contract at a fixed time without any condition, and it was alleged to be unpaid, it was held that no special demand was necessary, and that the breach of the contract sufficiently appeared.

Power of corporations to purchase and convey lands.—A corporation having power to purchase and hold real estate for the purposes of their incorporation, entered into an executory contract of purchase, by which they were to make payment at any time within one hundred years, paying taxes and interest in the mean time; and no right to possession was given until payment was made. Suit being brought for interest upon the contract, and neither the declaration nor the contract showing the purpose of the purchase, it was objected that it could not be for the legitimate use of the incorporation. But it was held that the contract was as consistent with that purpose as any other, and that the Court was bound to infer, until the contrary was alleged or proved, that such was the object of the purchase.

The Regents of the University of Michigan have power to take, hold and convey real estate, for any purpose tending to promote the interests of the University, to increase its funds, or otherwise to further the great public objects for which the corporation was created.

Where suit was brought by the Regents to recover the purchase price of lands sold by them, and the declaration alleged their ownership, but did not show the nature of their title, nor how acquired, and it was demurred to on the ground that the Regents had no power to make a sale of lands without special legislative authority: held, that as it was legally possible for the Regents, in some modes and for some purposes, to be vested with the title to lands with power to convey the same, the judgment on the demurrer must be for the plaintiffs.

Heard May 22d and 23d. Decided December 5th.

Error to Wayne Circuit, where plaintiffs in error brought suit in assumpsit, declaring as follows:

Wayne County, ss. "The Regents of the University of Michigan," a body politic and corporate, existing under the laws of Michigan, plaintiffs in this suit, by Levi Bishop, their attorney, complain of the "Detroit Young Men's Society," a corporation also existing under the laws of Michigan, defendant in this suit, which has been duly summoned to answer the said plaintiffs, of a plea of trespass on the case, upon promises.

For that heretofore, to wit, on the third day of August, in the year of our Lord eighteen hundred and fifty-eight, the said plaintiffs, then being the owners of the lot and parcel of land hereinafter mentioned, and the said defendant

Digitized by Google

wishing to purchase the same, the said plaintiffs and defendant entered into their certain contract or obligation, in writing, which said contract in writing the said plaintiffs now bring here into Court, sealed by the several parties and their agents executing the same, and which said contract in writing, with the certificate of acknowledgment thereon, is in the words and figures following, that is to say:

"This contract, made in duplicate, and entered into, this third day of August, in the year of our Lord eighteen hundred and fifty-eight, between the corporation known as 'The Regents of the University of Michigan,' of the first part, and the corporation known as 'The Detroit Young Men's Society,' of the second part, witnesseth, as follows:

The party of the first part does hereby agree to sell to the party of the second part, all their right, title and interest in and to the following lot or parcel of land, that is to say: That certain lot and parcel of land, situated in the city of Detroit, State of Michigan, generally called the "University Lot," situated on the corner of Bates and Larned streets, in said city of Detroit, and being eighty feet, more or less, on Larned street, extending from Bates street westerly to the alley, according to the plan of said city, and extending northerly two hundred and ten feet, more or less, on said Bates street, and containing sixteen thousand eight hundred square feet, more or less. This sale is made upon the following terms and conditions:

First. The said Detroit Young Men's Society, party of the second part, does agree to pay for said lot the sum of twenty-one thousand dollars, ($21,000), which is to be paid at any time within one hundred years from the date of this instrument.

Second. The said party of the second part does agree to pay, also, to the said party of the first part, interest

Digitized by Google

on said sum of twenty-one thousand dollars, at the rate of seven per cent. per annum, payable semi-annually, on the whole amount unpaid, and the said interest to commence running on the first day of January, in the year eighteen hundred and sixty.

Third. The said party of the second part also agrees to pay all taxes and assessments on said property, of whatever nature and description, ordinary and extraordinary, till the party of the second part shall become the absolute owners of the property as hereinafter specified and provided.

Fourth. The said party of the second part does also hereby agree to indemnify and save harmless the said party of the first part, from all claim which the city of Detroit may have against the said party of the first part by reason of any improvements which said city of Detroit may have made on said property, or otherwise arising from said property.

Upon the execution and performance of all the foregoing terms and conditions, by the said party of the second part, the said party of the first part will make, execute and deliver, to the said party of the second part, a deed of all their title to said lot or parcel of land.

It is further agreed, that this instrument shall be binding on the assignees and successors of the said parties respectively.

It is further understood and agreed, that if the party of the second part shall, while this contract continues in force, find it necessary to use the name of the party of the first part for the purposes of litigation against third parties, they shall be at liberty to do so, but always at the expense of the party of the second part, and without costs, charge or expense to the party of first part.

It is further agreed that if the party of the second part shall fail or be in default at any time, in the performance of any of the conditions of this instrument, that then, upon three months notice, the party of the first part

Digitized by Google

may declare this instrument null and void, and the same shall thereupon become null and void, so far as it binds the party of the first part.

In witness whereof, the party of the first part, by the undersigned Regents of the said University, present at a meeting of the Board of said Regents, held in the city of Detroit, on the day first above written, and the party of the second part, by their committee, duly appointed for this purpose, have mutually signed and sealed this instrument, and delivered the same, the year and day first above written.

Signed, Sealed and delivered in presence of
GEO. V. N. LOTHROP,
S. STEVENS.

L. H. PARSONS, [SEAL.]
LEVI BISHOP, [SEAL.]
J. EASTMAN JOHNSON, [SEAL.]
B. L. BAXTER, [SEAL.]
D. MCINTYRE, [SEAL.]
E. LAKIN BROWN, [SEAL.]
WM. M. FERRY, JR., [SEAL.]

Regents of the University of Michigan.

W. M. HEAZLIT,
S. STEVENS.

P. E. DEMILL, [SEAL.]
H. M. WHITTELSEY, [SEAL.]
J. S. FARRAND, [SEAL.]
B. VERNOR, [SEAL.]
S. D. ELWOOD, [SEAL.]

Committee on Real Estate of the Young Men's Society, of Detroit, Michigan.

STATE OF MICHIGAN,
COUNTY OF WAYNE:

On this third day of August, eighteen hundred and fifty-eight, before me, Sears Stevens, a notary public in and for said county, personally came the within named Luke H. Parsons, Levi Bishop, J. Eastman Johnson, Benjamin L. Baxter, E. Lakin Brown, Donald McIntyre, and William M.

Digitized by Google

Ferry, Jr., as Regents of the University of Michigan, and Peter E. DeMill, Henry M. Whittelsey, Jacob S. Farrand, Benjamin Vernor, and S. Dow Elwood, as committee on real estate of the Young Men's Society, of the city of Detroit, Michigan, known to me to be the persons who executed the within contract, and acknowledged the same to me as their free act and deed, as such Regents and as such committee respectively, and for the uses and purposes therein expressed. SEARS STEVENS.

And the said contract in writing, being as aforesaid executed by the parties thereto, was mutually delivered in duplicate between the said parties, plaintiffs and defendant, whereupon the said defendant became liable to pay to the plaintiffs the said interest money, and then and thereby, for the considerations expressed in said instrument, undertook and faithfully promised to pay to the plaintiffs the said interest money, semi-annually as expressed in said instrument, according to the tenor and effect thereof; yet the said defendant, though often requested so to do, hath not paid said interest money, but hath wholly neglected and refused so to do, leaving due and unpaid at the commencement of this suit, two full years of said interest, for which this action is brought: to the plaintiffs' damage five thousand dollars, and therefore they bring suit, etc.

LEVI BISHOP,
Plaintiffs' Attorney.

The defendants demurred to the declaration, assigning the following causes:

First. That the instrument set forth at length in said declaration, does not constitute any valid or binding contract upon which either the plaintiffs or defendants are or can be in any way liable.

Second. That there is no allegation in such declaration that the persons signing such instrument were the duly constituted agents of the said defendants for any such pur-

Digitized by Google

pose, or were in any manner authorized thereunto by any competent action of the said defendants.

Third. That the instrument set forth does not conform to the allegations of such declaration, inasmuch as it is not, and does not purport to have been, ever executed by the said defendants, or by any persons for them, nor that the same was ever sealed by the defendants, or their duly constituted agents. And, in that such instrument is not, and does not purport to have been executed by the plaintiffs, or by any person for them, nor that the same was ever sealed by the said plaintiffs.

Fourth. That there is no sufficient allegation of the breach of said instrument by such defendants, nor of any demand of payment thereunder.

Fifth. That there is no sufficient profert of said iustrument, or allegation of profert.

Sixth. That the plaintiffs had no power or authority to enter into such instrument without special legislative action thereunto, and there is no allegation thereof.

Seventh. That the defendants had no power or authority to enter into such alleged contract without special legislative authority, and there is no allegation thereof.

The Circuit Court sustained the demurrer, and rendered judgment against the plaintiffs.

L. Bishop and *T. M. Cooley* for plaintiffs:

1. A contract for the sale of lands may be by deed or by unsealed writing. To make it valid *as a deed* when executed by an agent, the authority must generally be by deed. But in other cases it is only necessary that the authority be given by writing. And in cases of a corporation, the authority may be conferred by mere resolution.

What was the form of authority in the present case does not appear, nor, in the view we take of the case, is it important, as in any event the instrument is good as a simple contract. The latter need not be signed in the

Digitized by Google

name of the principal, but it is sufficient if it purport to be the contract of the principal, and be signed by the agent:—8 *Pick.* 56; 1 *Doug, Mich.* 457; 9 *Paige*, 188; 20 *Ill.* 629; 4 *Barb.* 274; 17 *Wend.* 40; 22 *Wend.* 325; 1 *Cow.* 513; 3 *Hill*, 72; 8 *M. & W.* 834; 2 *Gray*, 387; 11 *A. & E.* 589; 22 *Pick.* 158; 3 *Johns.* 226; 6 *S. & R.* 12; 15 *Wend.* 256; 35 *Miss.* 385; 1 *H. & J.* 156.

When therefore the several agents signed their names to this contract, which on its face purported to be the contract of their principals, its execution was complete and ample to bind the principals. Affixing seals to their names did not in any way affect the contract thus completed. For if the seals are to be regarded as the seals of their principals, then, either they attached the seals without authority, in which case the instrument would still remain valid as a simple contract:—5 *Mich.* 133: or they attached them with authority, and then the act would be equally nugatory, because the seals are put to the names of the agents, and not to the names of the principals.

On the other hand, if the seals are to be regarded as those of the agents, the attaching them was still nugatory, because, it not being their contract, it could not be sealed with their seals. It remained, therefore, a simple contract, executed by the agents on behalf of their principals:—19 *Johns.* 65; 7 *Cranch*, 304; 30 *Barb.* 218; 2 *Pick.* 352; 1 *Seld.* 229; 3 *Kern.* 585.

The case would not be materially different if the contract itself failed to show with sufficient distinctness that it was the contract of the principals. For under a proper averment to that effect in the declaration, evidence might be given to establish that fact:—19 *Johns.* 60; 5 *Wheat.* 326; 20 *Ill.* 629; 5 *C. B.* 583; 12 *N. H.* 205; 11 *A. & E.* 589; 22 *Pick.* 158; 2 *Conn.* 680.

But after reading this contract it is impossible to be in doubt as to who is the contracting party.

2. It is claimed by defendants that the declaration

Digitized by Google

does not sufficiently allege that the contract in question was made by *agents* of the parties duly appointed.

The declaration avers that the *plaintiffs and defendants* entered into the contract. This we apprehend is sufficient. It was not necessary to say a word about the execution being by agents. That was matter of proof on the trial: —2 *Burr.* 1188.

If, therefore, the Court should be of opinion that the agency of the signers was not distinctly alleged in the declaration, what is said in regard to it might be treated as surplusage, and the declaration would still be sufficient.

3. Giving a copy of the contract is a substitute for profert and oyer if that were necessary, and the allegation of breach of the contract is in the usual form.

4. The Regents as a corporation have power to hold and convey land. It is well settled that corporations aggregate have at common law an incidental right to dispose of their lands, unless specially restrained by their charters. So far as *private* corporations are concerned, this principle will not be questioned; but the Regents being a *public* corporation, it may be claimed they do not possess the same power.

"Independent of positive law *all* corporations have the absolute *jus disponendi* of land and chattels, neither limited as to objects nor circumscribed as to quantity."—2 *Kent*, 281; and see 1 *Ves. & B.* 226, 244; 9 *Sim.* 30, 49; *Kyd on Corp.* 108; 1 *Greenl. Cruise*, 61.

We shall not dispute that public corporations may possess corporate rights in property of which they could not dispose without legislative authority. They are themselves creatures of legislative authority, and subject to change and destruction at the legislative will. As to any property conferred upon them by the sovereignty, *and which they must hold in order to enable them to discharge their public duties*, it may well be held that they have no power of sale. A sale under such circumstances would be inconsistent

Digitized by Google

with the purpose for which the corporation was created; and the power could not therefore be implied. A city can not sell its streets, because one of the purposes of its creation is to make and keep them in order, and it cannot fully discharge its public functions without them: —7 *B. Monr.* 680.

But all public corporations are possessed of some functions in the exercise of which they are regarded as private corporations, and governed by the same rules, and subject to the same liabilities as private persons. A city is a mere instrument of government so far as it exercises powers of general administration, conferred upon it as a part of the governmental power of the State, but is subject to all the rules of a private corporation in the management of its corporate property, and of those powers conferred upon it for the benefit of its corporators: — 3 *Hill*, 539; 3 *N. Y.* 463; 5 *N. Y.* 374; 1 *Ind.* 281; 9 *Mich.* 165.

As to any property, then, which a public corporation is not required to retain in order to enable it to discharge its public functions, the inherent power of sale must be the same as in the case of private corporations.

The case does not show how the Regents became the owners of this land, nor the purposes for which it was conveyed to them. Nor do we regard it as important, so long as it does not appear to be held for a specific corporate purpose inconsistent with the right to sell.

But if there could be any doubt of the right to alien in the case of public corporations generally, there should be none in the case of the University. The policy of all our University laws is not to have the University lands worked, rented, or otherwise used as real estate, but *sold*, and their proceeds appropriated to University purposes. The income of the institution is derived from the interest on the proceeds of sales of lands. Most of the lands are vested in the State as trustee; and as such trustee

Digitized by Google

the State is required to dispose of them and pay over the interest. If the Regents hold title to any, they hold as trustees also, and the same general policy of the law requires a sale by them, and a like appropriation of proceeds. So far, therefore, from an implied authority to sell being inconsistent with the charter of the Regents, it is in entire harmony with all the laws on the subject.

Certainly it cannot be true that the mere fact of a corporation being public precludes the idea of the power to sell lands. Suppose all the University lands conveyed directly to the Regents instead of the State, can there be the least doubt that the corporation which was to depend upon their proceeds for its income, would have power to sell and convey them, whether expressly conferred or not?

5. Power being expressly conferred upon defendants to purchase and hold real estate, it will be presumed, in the absence of any allegation and proof to the contrary, that the purchase was for legal and proper objects, as specified in the charter:—3 *Seld.* 466; 3 *Comst.* 470; 19 *N. Y.* 369; 4 *Denio*, 392; 3 *Sandf. Ch.* 339; 2 *Cow.* 664; 3 *Wend.* 94; 4 *Hill*, 444; 9 *Humph.* 731; 24 *Wend.* 587; 16 *Pet.* 492; 4 *Sandf. Ch.* 758. But if otherwise, that is a matter for the Attorney General, in a prosecution to vacate the charter, and not a subject of inquiry in this suit:—*A. & A. on Corp.* § 777; 5 *Flor.* 110.

S. D. Miller and *G. V. N. Lothrop* for defendants:

The demurrer was properly sustained:

First. The declaration was insufficient. It alleged that the contract was sealed by the parties—the respective corporations. The profert of the instrument shows no such seals.

It alleged a contract made by the parties through agents. The profert shows an instrument executed under their personal seals.

Digitized by Google

It does not allege any delegation of power or constitution of agency by either party.

So far as the party of the second part in the contract is concerned, the profert of the instrument shows no execution of the instrument, by that party or any agent.

Second. The instrument set forth in the declaration did not constitute a contract between the plaintiffs and defendants.

It was not executed by the parties, nor by any persons purporting to act for them.

The parties were corporate bodies; neither their names or seals were attached to the instrument.

It was signed and sealed by individuals as such; and in the act of execution they did not purport to be acting as agents.

There is a general clause, stating that the persons first signing were "Regents of the University of Michigan," and that the others were "Committee on Real Estate of the Young Men's Society of the City of Detroit, Mich.;" this was mere description:—4 *Mass.* 595; 4 *Eng. L. & Eq.* 426; 7 *Mass.* 14; 16 *Mass.* 42; 5 *Pet.* 348; 2 *Hill*, 489; 6 *Johns.* 94.

Third. The "Regents of the University" had no power to make the contract.

It is an agreement for the sale of lands, and unless power to convey exists, the contract is invalid. Have they this power?

It must be conceded that this so called corporation has no authority to sell any part of the "University lands" given by act of Congress to the State for the purpose of endowing the University.

Not only is the title to all of that property so vested that it can only be transferred by the agents of the State under special legislative action, but such legislation has been had, in pursuance of a general established system,

Digitized by Google

that the land officers of the State can alone make any binding contract.

We think it must also be conceded that the Regents can have no power to dispose of or incumber the site of the University buildings,—the forty acres of land; this property was given to the Regents "for the use of the State and for that express purpose."

It is quite apparent from the words of the statute that the State alone could exercise the right of disposition.

It is evident, also, from the history of legislation in reference to the University, under its present management, that the necessity for giving the Board of Regents power to sell any of the real estate belonging to the University has never been contemplated.

The only ground upon which the right can be claimed is this: That as by the decision of the late Supreme Court, in the case of The Regents, &c., v. The Board of Education, &c., (4 Mich. 213,) it was held that the corporation, "The Regents," &c., was the successor of the corporation "The Trustees of the University," &c.; and that as such they were entitled to the property in controversy; that being so vested with title, they have the power to sell, either through express authority or by fair implication.

In order to consider this position, it is expedient to form a correct judgment of the question involved in the case referred to. No point was raised nor was any decision had in respect to the nature and extent of the title claimed by the Regents. So far as the case has any application here, it was merely held that, as the land was vested in the "Trustees," for the use of the University, and as that body had given way to the "Regents," the purpose of the donation should not fail, but should be subserved by declaring the latter body to be the successors of the former.

The great point in controversy was, whether the University or the City of Detroit should be permitted to enjoy the property; and there can be little doubt that

Digitized by Google

the spirit of the law was well administered in holding that the University had the better claim. Whether the reasoning of the Court was altogether correct or not, there is nothing in the necessary consequences of the decision which should weigh against the defendants' position here. And it may be conceded that the Regents were, by means of that case, vested with title to the property "for the use of the University," just as the "Trustees" were; but not to the same extent.

The Regents have no express authority to convey any land belonging to the University.

The Constitution gave them "the general supervision of the University, and the direction and control of all expenditures from the University Interest Fund." *Art. XIII, sec. 5.*

The character and extent of that supervision is shown by the subsequent legislation. It related to the management of the institution in respect to the appointment of officers and instructors, the regulation of the course of instruction, the admission of students, the conferring of degrees, and other details of internal working: it gave them control of moneys received for tuition, for the purpose of repairing the buildings and the increase of the library.

These provisions were doubtless intended to constitute the Board the supreme officers of the University, as an institution of learning, — vested with authority to control its management as such, — vested also with the incidental power to govern its financial management.

The provision that they should have control of the expenditures from the University Interest Fund negatives any implication of power over the principal of that fund or its accumulations.

They have no implied power to sell the land in question.

What authority will the law confer incidentally upon such a body?

Digitized by Google

Though the Constitution recognizes them as a corporation, it should not be inferred that they are therefore subject to the same rules and principles with private corporations.

It may be granted that they constitute a *quasi* public corporation, like a county or township. These bodies are deficient in many of the powers incident to the general character of corporations, and possess such only as are essential to the discharge of the duties imposed by express statute:—*A. & A. on Corp. p.* 20; 4 *Mich.* 212; 1 *Kern.* 392; 5 *Seld.* 71.

No duty is imposed upon the Board of Regents by statute which rendered necessary the exercise of the power to sell this property.

Conceding that under the decision in 4th Mich. it was proper for the Board to enter into possession of this property, and perhaps to take the rents and profits, we contend that it was also their duty as State officers—limited trustees for the government of a State institution, and for the administration of such resources as the State might provide—to make representation to the legislative authority of the accession to the general fund, and to ask such specific legislation as might in the legislative wisdom be expedient for the management of this valuable property.

This done, their duty, their responsibility, and their authority would have ceased.

[Counsel then reviewed the past legislation of the State, arguing therefrom that the Regents have no power to sell the land in question.]

Fourth. The Young Men's Society had no power to enter into the contract in question.

The act of incorporation cannot be so construed as to enable such an organization to enter into an *executory contract* of this character, extending over a period of *one hundred years*:— *S. L.* 1836, *p.* 165; *S. L.* 1859, *p.* 269.

This was not an acquisition of property within the

Digitized by Google

meaning and purpose of the statute. The society gained no interest in the land. The instrument constituted a mere *chose in action:* it gave the society no right to the possession of the land.

If a private corporation, created "for the purposes of moral and intellectual improvement," may enter into an agreement to buy an uncertain claim to property at any time within one hundred years, to indemnify the other contracting party against unlimited and unascertained claims, to litigate, in the name of such party, with third persons not named, in reference to subject matters not stated, within any period of time, — if it may do all this under the clause authorizing the acquisition of such property as may be necessary and proper for the objects of the corporation, when at the same time the act creating it restrains its capacity to purchase to such property "only as shall be required for its accommodation in relation to the convenient transaction of its business," — there can scarcely be any limit to its power to contract.

The law contemplates an actual purchase of property — not such a speculating agreement as conveys no title and gives no present right to possession.

It contemplates an early if not immediate occupancy for the purposes of the organization alone: not the granting of a right to gain the occupancy a hundred years hence.

Will the law enforce such a contract of indemnity against such a party?

Will the law recognize the right of two bodies of the character named, to grant and receive power to use to an unlimited extent the name of one of them for the purpose of litigation?

We insist that the contract on the part of the Young Men's Society was beyond the scope of their powers and purposes, and was, in its terms, contrary to the spirit and policy of the law: — *A. & A. on Corp., p.* 232, etc.; 1 *Doug. Mich.* 401.

Digitized by Google

CHRISTIANCY J.:

All the questions in this case arise upon the demurrer to the declaration. Several causes of demurrer are assigned; and as the judgment of the Court below, sustaining the demurrer, was general, and it does not appear upon what particular ground the declaration was held insufficient, it will be necessary to notice all the special causes of demurrer assigned, unless the objections which relate to the form of the declaration rather than to the right of action, shall be found to be well taken. If any of these are sustained, no question can properly arise upon those which relate to the cause of action itself, and which would be the same under any form of declaration. We shall therefore first notice those which relate to the form of the declaration, and the manner in which the cause of action is set forth.

The first objection is, in substance, that there is no allegation that the persons purporting to sign the contract for the defendant corporation, were their duly constituted agents for the purpose, or in any manner authorized to do so by any competent action of the defendants.

Upon this point the declaration alleges that the "defendant entered into the contract." The contract is made a part of the declaration, and set forth at large in its words and figures, and it is declared upon its face to be a contract "between the corporation known as 'The Regents of the University of Michigan,' of the first part, and the corporation known as 'The Detroit Young Men's Society, of the second part;" and the contract in all its stipulations, is, in form, that of the respective corporations. The attestation clause is in the following form: "In witness whereof the party of the first part, by the undersigned, Regents of the University, present at a meeting of the Board of said Regents, held in the city of Detroit, on the day first above written, and the party of the second part, by

Digitized by Google

their committee duly appointed for this purpose, have mutually signed and sealed this instrument, and delivered the same, the day and year first above written." The persons purporting to sign for the defendants do so by affixing their individual names, describing themselves collectively as "committee on real estate of the Young Men's Society of the city of Detroit." The declaration states the liability of the defendant upon the contract, and alleges the promise of the defendants in consideration of that liability. We think, therefore, the contract set forth, and the allegations of the declaration, are ample to admit full proof of the authority or agency of the persons purporting to execute on the part of the defendant, in any form in which it was competent for that authority to be given. Had the pleader only purported to set forth the contract by its legal effect, it would not have been necessary to notice the fact that it was executed by agents; it might have been stated as executed by the defendant directly; the agency would be mere matter of proof. If it became necessary to allege the agency because the contract set forth purported to be executed by the agency of the committee, then the contract which is set forth as a part of the declaration, and which asserts the agency, and the allegation of the declaration that it is the contract of the defendants, must be held sufficient to admit the proof of the fact. The particular manner of constituting the agency—if not the agency itself—was matter of proof, not of pleading.

The next objection is, that the instrument set forth does not conform to the allegations of the declaration, inasmuch as it does not purport to have been executed by the plaintiffs, or defendants, or any person for them, nor that the same was sealed by the respective corporations or either of them. It needs but a glance at the attestation clause, and the signatures, to show that so much of the above objection as claims that the instrument set forth does not purport to be executed by the plaintiffs or defend-

Digitized by Google

ants, or any person for them, is not well founded. But there is more plausible ground for that portion of the objection which relates to the allegation in respect to the seals.

The declaration, before setting out the instrument in its words and figures, does allege that "the said plaintiffs and defendant entered into their certain contract or obligation in writing, which said contract in writing the said plaintiffs now bring here into court, sealed by the several parties and their agents executing the same, and which contract in writing, with the certificate of acknowledgment thereon, is in the words and figures following," [setting it forth].

The attestation clause of the instrument (above cited), might indicate an intention of attaching the seals of the parties — the respective corporations — though it is not in the usual form of the attestation clause where corporate seals are to be affixed. But the actual execution is, on the part of the Regents, by signing their individual names as Regents, and by affixing their separate seal (or scroll) at the end of each respective name; and the committee for the defendant corporation sign their individual names as a committee, with a similar seal at the end of each of their names.

We do not think these seals can be treated as the seals of the respective corporations or either of them. They are but the individual seals of the several persons signing the instrument; and as the contract does not purport to be that of the individuals thus executing, but of the respective corporations, these individual seals are merely nugatory, and can not alter the legal effect of the instrument. It must therefore be treated as an unsealed instrument, or simple contract in writing; and, as such, we think the respective corporations are bound by it, if it is in other respects valid in law:—*Angell & A. on Corp.* §§ 295 *and*

Digitized by Google

223, *and cases there cited; see also (by analogy) Sweetzer v. Mead*, 5 *Mich.* 107.

Had the declaration only attempted to set forth the contract according to its legal effect, without setting forth the whole instrument so as to enable the Court to determine its legal effect, doubtless there must have been a variance in proof, as it would not have supported the allegation in respect to the seals. But when the instrument is set forth in full, the Court are to say what is its legal effect; and any allegation in respect to the description or effect of the instrument, in a matter which must appear upon its face as set forth, is, we think, entirely superfluous, and may and should be rejected as surplusage. And if the instrument, as set forth, should correspond with that offered in evidence, no court could, we think, so far disregard the dictates of common sense as to reject it because it did not correspond with such superfluous allegation.

The legal effect of the contract, as it relates to the present action of assumpsit, so far at least as any question can arise upon demurrer, would be the same whether under seal or not; since the statute, *Comp. L.* § 4550, allows actions of assumpsit to be brought upon contracts under seal "in the same manner, in all respects, as upon contracts without seal."

It is further objected that there is no sufficient profert of the instrument. Being but a simple contract, no profert was necessary. But had it been a sealed instrument, not only is the proper profert made, but oyer is granted and the copy furnished in advance; and any further profert, or oyer (the furnishing of another copy) would be but an idle ceremony.

But it is further urged, as a cause of demurrer, that there is no sufficient allegation of the breach of the contract, nor of demand of payment. The interest being due at a fixed time, and without any condition, and alleged to be unpaid, no special demand was necessary: a request

Digitized by Google

is alleged in the usual form. The breach of the contract, in the non-payment of the interest, is directly and positively alleged.

The declaration is therefore sufficient in every thing relating to the plaintiffs' cause of action and the defendant's liability, if the instrument declared upon be a valid contract.

But the first, sixth and seventh causes of demurrer relate to the validity of the contract; and it is insisted that neither the plaintiffs nor the defendant had power to enter into the contract without special legislative authority, and that none is shown.

We will first consider the power of the defendant. By the act of incorporation — Laws of 1836, p. 166 — the corporation is authorized to acquire, by gift, devise, purchase or otherwise, and to hold and convey, any real, personal or mixed estate whatsoever, necessary and proper for the objects of this incorporation: Provided the same shall not exceed the sum of twenty-five thousand dollars (which is extended to $200,000 by the act of 1859, Laws of 1859, p. 270). But, by section four, the real estate which the corporation is allowed to purchase is to be "only such as shall be required for its accommodation in relation to the convenient transaction of its business." The object of the incorporation is declared to be "for the purpose of moral and intellectual improvement;" and express power is given to establish and superintend a library. We think it quite clear, therefore, the corporation has the power to acquire, by purchase or otherwise, and to hold real estate for the erection of such buildings as they may see fit, and as their convenience may require, for a library, for lecture rooms and places of meeting. And the power to purchase must include, as a means to an end, the power to enter into a contract for such purchase upon such terms as may be agreed upon. It is not denied that such would be the result, if it appeared upon

Digitized by Google

the face of the contract, or were otherwise shown, that such was the object of the purchase. But it is said this purpose does not appear upon the contract, and is not alleged: and it is urged that such cannot be its purpose, as the time for acquiring a title is extended over the period of one hundred years, the contract giving no right of possession until the whole price is paid, and requiring the society to pay all taxes in the meantime, indemnifying the Regents against all claim of the city of Detroit for improvements, and giving the right to use the name of the Regents for purposes of litigation.

It is true the contract gives the defendant no right of possession until full payment and conveyance. But, on the other hand, as it was not bound to wait the one hundred years to make payment, but was at liberty to pay and call for a deed the next day after the execution of the contract, we can not say, without any allegation or proof to that effect, that the object of the purchase was not for the legitimate use of the society. The contract is just as consistent with that purpose as any other; and we are therefore bound to infer — until the contrary is alleged or proved — that such was the object of the purchase.

The only remaining question, is, that of the power of the Regents to sell this property. This question might depend upon the mode and purposes of the acquisition, the objects and terms expressed in the instrument by which the title was acquired. And as the Regents have been held to be the successors of the trustees of the University under its old organization—who had an express power of sale vested in them—and the powers and functions of the present organization are different in many other respects, the question might perhaps be affected by the fact when and by which organization the property was acquired. But so far as the question of the power of the Regents to sell may depend upon any of these considerations, it can

Digitized by Google

not be definitely decided upon the present record, as the time when the title was acquired does not appear, nor the mode or purpose of its acquisition. No *particular* title is set forth, nor was this necessary. The allegation is general, that the plaintiffs, on the third day of August eighteen hundred and fifty-eight, "being the owners" of the premises, and the defendant wishing to purchase, the said plaintiffs and defendant entered into the contract. This allegation, being mere inducement, was sufficient, and it is broad enough to admit proof of any legal title or ownership under which a right of sale could exist. The particular title would be matter of proof only. The title of the plaintiffs is therefore well pleaded, if they were competent in law to take or hold a title which would enable them to sell. If, therefore, as a legal possibility, there could have been, at the time alleged, such a title in the plaintiffs as would give them the power of sale, the judgment upon the demurrer must be for the plaintiffs, however they might have failed upon the trial to establish such title by proof.

The abstract question, therefore, of the legal possibility of such ownership by the plaintiffs, is the only question upon this branch of the cause which can be decided upon this demurrer. Upon this question I think there can be little room for doubt. This being an action at law, any conveyance, by grant or devise, vesting in them the whole legal title, though it were upon special trusts, would satisfy the allegation of ownership contained in the declaration, if it conferred the power of sale, as well as if no trust had been declared. The power of taking and holding real estate — as well as personal property—is generally laid down as one of the powers incident to every corporation, unless there be an express prohibition, or such power be clearly repugnant to the purposes of its creation, or forbidden by some positive law: — *A. & A. on Corp.* §§ 110, 111; 2 *Kent*, 224. And the power to convey, except

Digitized by Google

where its acquisition is for some special purpose, not shown here, and inconsistent with the power of sale, is a correlative of the right to acquire:—*A. & A. on Corp. ut supra.* And see *Ibid.* §§187 *to* 192. We have no statute of mortmain which can affect the question. And the power of this corporation to take, hold and convey real estate, for any purpose clearly tending to promote the interest of the University, to increase its funds, or otherwise to further the great public objects for which the corporation was created, can not, I think, admit of a reasonable doubt. The right to take and hold property, such at least as the University grounds and buildings, library and apparatus, and to transmit or continue its ownership by corporate succession, was doubtless one of the main objects of the incorporation in its present form; yet no express power of this kind is to be found in the act of incorporation. And, though it is clear that they can exercise no power over the land granted by Congress to the State for the support of a University, nor over the principal of the University fund, the disposition of both of which the Legislature has placed in other hands, yet if some benevolent individual, desirous of promoting the public interest, should have conveyed this or any other land to these Regents in their corporate capacity, vesting in them the whole legal title, for the express purpose and upon the express trust, that they should sell and convey the land in such manner and on such terms as they should deem best for the interest of the institution, and place the proceeds in the State treasury to the credit of the University fund, or expend them for the increase of the library, or the chemical or philosophical apparatus, I can see no possible ground to doubt their power to take and hold the property, or to accept and execute the trust by a sale of the land for such purpose. See *Vidal v. Girard's Executors*, 2 *How.* 190; *Executors of McDonough v. Mur-*

Digitized by Google

dock, 15 *How.* 367; *Perrin v. Carey* (*McMickin's will*), 24 *How.* 465.

Many other cases might be put in which their power of sale would be equally clear. But it is unnecessary to multiply instances, since a title like that above supposed would be admissible under the allegation of ownership contained in this declaration.

But it is said we can not presume a trust, as none is mentioned in the contract. It is sufficient to say that, if such trust existed, it was unnecessary to mention it in the contract, or in the declaration. It would be sufficient if the title, when produced in evidence, disclosed a trust which would sustain the power of sale. There is no occasion for any presumption. It is not a question for presumption, but what evidence would be admissible under the allegation; and we are certainly not at liberty to indulge any presumption against the truth of the allegation of ownership, which is broad enough to include such title in trust. What right, on the other hand, have the Court to presume that this is a part of the land conveyed to the State for the use of the University? Or that, though conveyed to the Regents, the conveyance was such as to deprive them of the power of sale, when it may have been so granted as to give them that power? Can we deny them the right to prove their allegation? It is not for the Court, upon demurrer, more than for the opposite party, to deny the truth of the allegation demurred to. The question is not upon its truth, but its sufficiency. Its truth is admitted by the demurrer, unless legally impossible.

It was stated on the argument that the lot mentioned in the contract was conveyed, in the year 1825, by the Governor and Judges of the territory of Michigan, to the "Trustees of the University of Michigan" as organized under the act of 1821, for the use of the University; and we are referred to the decision in *The Regents of the University v. The Board of Education of Detroit*, 4

Digitized by Google

Mich. 214, holding the Regents under the present organization to be the successors of said trustees, or, rather, a continuation of the same corporation. But to enable us to decide upon demurrer the power of the present corporation to sell lands thus conveyed, the fact, date and nature of the conveyance, should appear upon the pleadings. It is not desirable, if it were competent, to decide a case of this magnitude hypothetically, further than we may be compelled to do by the nature of the question. The question of the power of the plaintiffs to convey, under the supposed deed from the Governor and Judges, is in no way necessary to the decision of the cause, and is not involved in it; since, if this were decided against the plaintiffs, the decision upon this demurrer must still be in their favor. It will be time enough to decide this question when it is presented by the pleadings, or upon objections taken to the proof which may be offered.

The judgment of the Court below must be reversed, with costs to the plaintiffs in both Courts. And the defendant must have leave to plead to the declaration.

MARTIN CH. J. concurred.

MANNING J.:

The University of Michigan is a public corporation. The People, in their political capacity, are the corporators. It is a part of the educational system of the State, and is under the control of the Legislature, except so far as it has been placed beyond the reach of that body by the Constitution, and the trust attached to the University fund. In all other respects it is subject to State legislation, and may be moulded from time to time to suit the actual or supposed wants of the public. The corporation of to-day is the corporation known as the University of Michigan, under "An act for the establishment of a University," approved April 30, 1821. *Laws of Michigan*,

Digitized by Google

1827, *p.* 445. And the corporation under this last mentioned act was the corporation created by the Governor and Judges of the territory of Michigan, on the 26th August, 1817, by an act entitled "An act to establish the Catholepistemiad, or University of Michigan," if an organization in fact ever took place under this last mentioned act. See *Regents of the University of Michigan v. The Board of Education of the City of Detroit*, 4 *Mich.* 213. The present corporation has been made to differ from what it was under the two last mentioned acts by the legislation and Constitution of the State. It was a public corporation originally, and has been throughout. It was created to subserve a great public want—the education of the people. For while freedom is the corner stone of our political fabric, intelligence is the cement that holds its several parts together.

The act of April 30th, 1821, gave to the Trustees of the University the control of both the property and government of the institution. They were declared capable of holding property, real and personal, and of buying and selling and otherwise lawfully disposing of it, with certain restrictions imposed on the disposition of property mentioned in the seventh and eighth sections of the act. Under the State government a different policy was inaugurated. The government of the institution and the control of its property were separated from each other, and no longer trusted to the same hands.

The former was given to the Regents, who took the place of trustees under the territorial organization, while the latter was retained by the State, intrusted by law to the Superintendent of Public Instruction.

This office was created by the Constitution of 1835. And by "An act to provide for the disposition of the University and primary school lands, and for other purposes," approved March 20th, 1837, the Superintendent of Public Instruction was to have the care and disposition of

Digitized by Google

all lands and other property reserved and granted to the State for purposes of education:—*S. L.* 1837, *p.* 209, § 1. He was to sell the University and school lands, and loan the money, the interest on which was to be paid to the State Treasurer, and by him to be passed to the credit of the University or school fund as the case might be:—§§ 16, 19. He was to submit to the Legislature an annual report, exhibiting the condition of the University and primary school funds; to apply the income of the University fund to the payment of such debts as should accrue from the operation of the law establishing the University; and to prepare annually a table of the amount payable to the University, and also the amount of the aggregate payable to the several counties, and present the same to the Auditor General, who was thereupon to issue his warrant on the Treasurer of the State for the amount payable to the University, and to the several counties:—§ 18. And it was made the duty of the State Treasurer to pay such warrant to the Treasurer of the University, or of the county, as the case might be:—§ 19. And by "An act to provide for the organization and government of the University of Michigan," passed at the same session, the University was organized. See *Laws of* 1837, *p.* 102. This act does not, in express terms, repeal the act of 1821, and yet as it and the act already mentioned cover the ground covered by the act of 1821, and are inconsistent with the latter act, it must be regarded as repealed by implication. It is not necessary for our present purpose to point out the differences between the two acts, any further than to say, that the act of 1837, unlike the act of 1821, does not give the Regents power to sell, or otherwise dispose of the property of the University. It states the object of the University to be, to provide the inhabitants of the State with the means of acquiring a thorough knowledge of the various branches of literature, science and the arts, and vests its government in a Board

Digitized by Google

of Regents, and declares them a body corporate, with the right of suing and being sued, and prescribes their powers, and makes it their duty, as soon as the State shall provide funds for that purpose, to erect the necessary buildings for the University, on grounds to be designated by the Legislature, and in such manner as shall be prescribed by law. No mention whatever is made of the care and disposition of the property of the institution, for the reason that that had been placed under control of the Superintendent of Public Instruction.

Changes have been made from time to time, but none showing an intention on the part of the Legislature to give to the Board of Regents power to dispose of the property of the institution.

By our present Constitution, "The proceeds from the sales of all lands that have been or hereafter may be granted by the United States to the State, for educational purposes, and the proceeds of all lands or other property given by individuals, or appropriated by the State for like purposes, shall be and remain a perpetual fund, the interest and income of which only is to be expended:"—*Art. XIII*, § 2. And by § 8 of the same article it is provided, "The Board of Regents shall have the general supervision of the University, and the direction and control of all expenditures from the University Interest Fund."

Here is a constitutional provision giving the Regents control of the interest of the University fund, but not of the fund itself. Why this constitutional provision if it was intended the Regents should have the control and disposition of the property of the University, as the trustees had under the act of 1821? If it be said, these lands were deeded to the University, and therefore do not come within the description of lands which the Commissioner of the State Land Office is authorized to sell — that officer, instead of the Superintendent of Public Instruction, now having the sale of the University and school lands—the reply is,

Digitized by Google

the Legislature can give him the power. It is no reason for giving by implication powers which it is clear the Legislature never intended to give. The property the Board of Regents have contracted to sell amounts to $21,000. What power have they to invest the money? On what security, and to whom, and at what rate of interest is it to be loaned, and who is to collect and account for the interest, and to whom? We can hardly suppose the act would be silent on all these subjects if there was an intention on the part of the Legislature to give the power claimed. And I can see no reason for dividing the University fund into two parts, and placing one in charge of the State, and the other of the Board of Regents.

I would stop here, but for a suggestion that has been started on which I will say a few words.

It has been suggested whether the land contracted to be sold may not be held by the corporation in trust, with power to sell the same. If we suppose such to be the case, I do not see that it removes the difficulty I have stated — the want of power in the Board of Regents to convey. I do not understand that the functions of a corporation can be enlarged by a deed of trust; that is, that a trust can be made the means of communicating new faculties to a body corporate. The admission of such a principle would enable a corporation, after parturition, to be metamorphosed into quite a different being; so much so as hardly to be recognized, if not seemingly to lose its identity. An insurance company might be changed into a bank, and a bank into an insurance company. When a corporation is made a trustee, the execution of the trust must come within the faculties of the corporation, or the trust must go unexecuted until a competent trustee is appointed. If we are correct in these views, the error in supposing the facts suggested would help the plaintiff, lies in taking it for granted that the power of the corporation to convey is in the Board of Regents instead of the State.

Digitized by Google

It must be borne in mind that this is a public corporation, created for governmental purposes; that the People of the State in their political capacity are the corporators; and that in creating the corporation they reserved to themselves, through the Legislature, the power of disposing of the property of the corporation instead of giving it to the Regents.

If it be said the suggestion may be carried a step further, and take it for granted that by the trust deed the power to sell is given to the Board of Regents, and not to the corporation, it does not extricate us from the dilemma. If the trust is to the Regents of the University of Michigan, that being the corporate name, it is to the corporation, and not to the persons composing the Board of Regents, as individuals. If it is to them as individuals, they must execute it in their individual capacity, and not in the name of the corporation. The contract is in the name of the corporation. And the power of the corporation to convey, as I have attempted to show, is not in the Board of Regents, but in the corporators, the People in their legislative capacity; in other words, in the State.

For these reasons, without noticing the other questions made on the argument, I think the judgment of the Court below should be affirmed, with costs.

CAMPBELL J. did not sit in this case.

Judgment reversed.

John Quinlon v. Ebenezer H. Rogers.

Constitutional law: Tax titles.—The provision in the tax law of 1858, authorizing proceedings before a circuit court commissioner to test the validity of tax titles, having been declared unconstitutional (*Waldby v. Callendar*, 8 *Mich.* 430), the further provision that a tax deed recorded two years shall be conclusive, falls with it.

Heard May 26th and 27th. Decided December 5th.

Digitized by Google

QUINLON v. ROGERS.

Error to Wayne Circuit, where Rogers brought ejectment to recover certain premises in the city of Detroit. These premises were sold in 1854 for delinquent State and county taxes of 1853, and bid in by the State, and were subsequently re-sold by the State in 1855 to the plaintiff, and a deed given therefor April 17, 1856. Under this deed, which was recorded in the office of the register of deeds April 24, 1856, the plaintiff claimed title. The suit was commenced more than two years after the recording of the deed.

On the trial in the Circuit Court Quinlon offered evidence to show that the amount of tax for which the land was sold was materially larger than was authorized by law; but the Circuit Judge held that it was inadmissible to controvert the plaintiff's title under the said deed; and the plaintiff had judgment in his favor.

E. C. Hinsdale, for plaintiff in error, argued the following positions:

1. That neither the 89th nor 124th sections of the Tax law of 1858 apply to this deed, but only to such as should, after the passage of the act, be executed by the Auditor General.

2. If they do apply to deeds given before, they are so connected with section 101 of the same statute, which has been declared unconstitutional (*Waldby v. Callendar*, 8 *Mich.* 430), as to fall with it; 5 *Ohio St. R.* 497; 2 *Gray*, 84, 99.

3. That the provisions in question are unconstitutional, because depriving owners of their property without due process of law; 2 *Dall.* 310; 18 *Johns.* 442.

4. They are also unconstitutional because an exercise of judicial power. They declare, *first*, in substance, that certain deeds of the Auditor General shall be perfect and indefeasible titles: and *second*, that all opposing titles,

Digitized by Google

from any other source, however valid and legal, shall be null and void. See 10 *Yerg.* 59; 1 *Chip.* 237; 5 *Humph.* 165.

Wells & Hunt and *T. Romeyn* for defendant in error, among other things, argued that section 124 establishes a new rule of evidence, giving to a recorded deed after the lapse of two years an effect as evidence that it had not before. This was clearly within the power of the Legislature, whether the deed was recorded before or after the passage of the act:—3 *Pet.* 280; 2 *Kern.* 541; 13 *How.* 472; 15 *Ark.* 338; 7 *Ark.* 428; 21 *How.* 338; 1 *Scam.* 335; 2 *Mich.* 495; 2 *Gilm.* 473; 4 *Gilm.* 58; 39 *N. H.* 304; 14 *La. An.* 853; 18 *Johns.* 441; 11 *Ill.* 420; *Har. Ch.* 3. The section was an amendment to the law of 1853, and its effect is to give the defendant two years after the passage of the act within which to contest the legality of the Auditor's deed;—1 *Hill*, 324; 7 *Ind.* 91; 7 *Ind.* 468; 2 *Doug. Mich.* 307; 2 *Ind.* 486.

They also argued that section 101, which was declared unconstitutional, did not apply to lands which had been bid in by the State.

BY THE COURT:

The Legislature in making the rule that a deed recorded two years should be conclusive, did not design to leave parties without the means of testing it in the mean time. The remedy they provided was held void in *Waldby v. Callendar.* There is no other adequate remedy, and we think the whole statute was designed to go together; so that, the remedy failing, the whole provision falls with it.

Judgment reversed, with costs, and a new trial ordered.

Digitized by Google

James H. Gray v. Lorretta C. Howard.

When a case is made for review on the facts, all the evidence must be returned.

Submitted on briefs July 17th. Decided December 5th.

This was a case made after judgment, for review by this Court. No exceptions were taken on the trial below, and the case did not contain all the evidence. The COURT held that the objection that the evidence did not support the finding could not be raised, unless where a case is made for review on all the facts. Here the finding must be taken as true, and being so regarded, it fully sustains the judgment.

Backus & Harbaugh for plaintiff.

F. Muzzy for defendant.

The People on the relation of the Superintendent of Public Instruction v. The Auditor General.

Constitutional law: irrevocable appropriation for educational purposes. The act of 1857 setting apart seventy-five per cent. of the proceeds of swamp lands for the primary school fund, does not constitute such an appropriation of the *lands* to educational purposes, as to place them, under section two of article thirteen of the Constitution, beyond legislative control.

It was held, therefore, that the act of 1858, which reduced the proportion thus set apart, was not invalid for this reason; and that the primary school fund was not entitled to claim, under said act of 1857, seventy-five per cent. of the proceeds of lands sold after the act of 1858, or seventy-five per cent. of the value of lands appropriated by subsequent acts to the construction of roads.*

Heard July 17th. Decided December 5th.

Motion for a mandamus. The motion was made for the purpose of settling doubts which existed as to the rights

*In a recent case in Illinois, the Supreme Court of that State passed upon some questions of importance arising under the act of Congress by which the swamp lands were granted to the several states in which they are situate. By the terms of the grant it is made "to enable the State" "to construct the necessary levees and drains to reclaim the swamp and overflowed lands therein;"

Digitized by Google

of the primary school fund in the proceeds and value of swamp lands donated to the State by act of Congress of September 28, 1850, and those subsequently sold or appropriated for roads under the legislation referred to by the Court.

T. M. Cooley for the motion.

A. Williams, Attorney General, and *J. W. Longyear* for respondent.

BY THE COURT:

The relator claims that, by an act of 1857, (*Comp. L. p.* 799,) seventy-five per cent of the proceeds of swamp lands was irrevocably devoted to the school fund. The act of 1858 (*S. L.* 1858 *p.* 169) reduced this amount to fifty per cent, and acts have since been passed (*S. L.* 1859, *p.* 310; *S. L.* 1861, *p.* 461) appropriating parcels of land specifically towards roads and other improvements. The relator claims that seventy-five per cent of the proceeds of lands sold since 1858, and seventy-five per cent of the value of the lands so appropriated for improvements, should be paid into the school fund by the State. This claim is made under the clause of the Constitution which provides that "the proceeds from the sales of all lands that have been or hereafter may be granted by the United States to the State for educational purposes, and the proceeds of all lands or other property given by individ-

and "the proceeds of such lands, whether from sale or by direct appropriation in kind, shall be applied exclusively, as far as necessary, to the purpose of reclaiming said lands, by means of the levees and drains aforesaid."

The Supreme Court of Illinois held,

1. That by this act a fee simple estate in the swamp lands passed unequivocally to the State. The State became the absolute owner of the lands, with power to dispose of them in such manner, and for such purposes as to the Legislature might seem most expedient.

2. Even if the grant of the swamp lands to the State had been made upon the trust that the proceeds of the lands should be expended in reclaiming them, such a trust would have been of municipal and not judicial concern, over which the power of the State would have been plenary and exclusive. The Courts have no power to compel the Legislature to execute such a trust. *Supervisors of Whiteside Co. v. Burchell*, 31 *Ill. Rep.*

Digitized by Google

uals or appropriated by the State for like purposes, shall be and remain a perpetual fund," &c.

These lands were never appropriated by the United States for educational purposes, nor have they been so appropriated by the State. No appropriation attached under the law of 1857 to anything but the proceeds of lands when actually sold; and the State was not thereby precluded from making any provision which might be deemed expedient concerning future sales. We are of opinion that the law of 1858 did not, therefore, impair any constitutional right of the school fund, and that no more than fifty per cent can be claimed on sales since made. We are also of opinion that for lands appropriated without sale there is no claim whatever on behalf of the school fund.

The mandamus must be denied, without costs to either party.

CHRISTIANCY, J. did not hear this case.

William A. Butler and others v. Andrew Ladue and others.

Mortgage conditioned for payment: power of sale on failure to indemnify. A condition in a mortgage that the mortgagor shall "promptly pay and discharge all notes or other papers of his upon [which [the mortgagees] shall become indorsers or acceptors, together with all interest, costs and charges accruing thereon, so as to save said parties of the second part harmless by reason of their connection with such paper," is broken at once on a failure to pay the paper at maturity, and a right to foreclose accrues, without further action on the part of the mortgagee.

In a mortgage with the condition above set forth, the power of sale was limited to the case of the [mortgagees being damnified by paying the debts. It was held that the power of sale need not be coextensive with the condition of the mortgage, and that the remedy in equity was open for every breach of the condition, whether the parties had seen fit to provide for such breach in the power of sale or not.

Heard July 16th and 17th. Decided December 5th.

Digitized by Google

BUTLER v. LADUE.

Appeal in Chancery from the Wayne Circuit.

On the fifteenth day of December, 1858, Ladue executed to the firm of Marvin & Stephens, a mortgage of lands, with condition and power of sale as follows:

"Provided always, and these presents are upon this express condition, that if the said party of the first part shall and does well and truly indemnify and keep harmless the parties of the second part, and their representatives, of and from all loss, costs or damages of any and every kind, by reason of their having become and intending yet to become indorsers or acceptors of the paper of said party of the first part, to an amount not exceeding ten thousand dollars in all, and if said party of the first part shall promptly pay and discharge all notes or other papers of his, upon which said parties of the second part shall or may be or become indorsers or acceptors, together with all interest, costs and charges accruing thereon, so as to save said parties of the second part harmless, by reason of their connection with such paper, it being the intention hereof that this instrument shall enure and operate as a security and indemnity in the hands of the parties of the second part, against any liabilities they may hereafter assume upon the paper of the party of the first part, to an amount not exceeding ten thousand dollars, and for which engagements this indenture of mortgage shall operate to the said parties of the second part as collateral security, then these presents and the obligation of indemnity hereby assumed by the party of the first part shall cease and be null and void. But in case of non-payment by party of first part of the said papers so to be indorsed by parties of the second part, and of its payment by the latter, or of the interest thereof, or any part of said principal or interest, at the time, in the manner and at the place above limited and specified for the payment thereof, then and in such case it shall and may be lawful for the said parties

Digitized by Google

of the second part, their heirs, executors, administrators or assigns, and the said party of the first part does hereby empower and authorize the said parties of the second part, their heirs, executors, administrators or assigns, to grant, bargain, sell, release and convey the said premises, with the appurtenances, at public auction or vendue, and on such sale to make and execute to the purchaser or purchasers, his or their heirs and assigns, forever, good, ample and sufficient deed or deeds of conveyance in law, pursuant to the statute in such case made and provided, rendering the surplus moneys (if any there should be) to the said party of the first part, his heirs, executors or administrators, after deducting the costs and charges of such vendue and sale aforesaid, and also fifty dollars, as an attorney fee, should any proceeding be taken to foreclose this indenture: and said party of the first part hereby covenants with said party of the second part so to indemnify them as is hereinbefore expressed."

In May, June and July, 1860, Ladue executed five several notes, payable to the order of Marvin & Stevens, which were indorsed by them for the accommodation of Ladue, and delivered to the complainants. These notes in the aggregate amounted to less than $10,000, and were all payable on short time. They not being paid at maturity, and the liability of Marvin & Stevens as indorsers being fixed, the complainants filed this bill, setting forth these facts, and also that Marvin, Stevens and Ladue were all insolvent, and praying that the mortgaged premises might be decreed to be sold to satisfy the said notes.

Ladue demurred to the bill, and the demurrer being overruled, he afterwards filed an answer, and the case was heard on pleadings and proofs, and decree entered for complainants as prayed.

Douglass & Andrews for complainants:

The mortgage is more than a mere indemnity against actual pecuniary loss. It is conditioned that the mort-

Digitized by Google

gagor "*shall promptly pay and discharge all notes*" which the mortgagees might indorse. The added expression, "*so as to save the said parties of the second part harmless*," means nothing more nor less than the expression, "*and thereby save said parties harmless*," would have done. The mortgagor was not only to save the indorsers harmless, but he was to do this by the *prompt* payment of his notes at their maturity.

The mortgage is declared to be intended as a *security*, as well as an *indemnity;* and against any *liabilities* which the mortgagees might assume; but it is held that a covenant to indemnify against liability, is broken whenever the liability becomes fixed:—8 *Cow.* 639, 653; 8 *Wend.* 452; 19 *Wend.* 423; 10 *M. & W.* 293; 1 *Burr.* 574; 2 *Stark.* 167; 9 *Penn.* 371.

Referring to liabilities to be assumed by the indorsers, the mortgage provides: "*for which engagements this indenture of mortgage shall operate to the said parties of the second part as collateral security;*"—not as a mere means for obtaining reparation and compensation for possible future losses, but as a collateral security, to be employed in the most efficient manner for the protection of the mortgagees.

So, the condition, though awkwardly and ungrammatically expressed, is evidently intended to provide that the mortgagor shall pay the indorsed notes "at the time, in the manner, and at the place" therein stipulated.

But dismissing these verbal criticisms, it is perfectly evident, from the whole tone of the instrument, that the parties intended the mortgage to operate not as a pure indemnity against actual loss — to be made available only by a process of foreclosure, which could not occupy less than a year, and could only be commenced after the mortgagees had themselves advanced the money, or had been ruined by executions — but as a present and continuing security, to be used by the mortgagees, and made availa-

Digitized by Google

ble as a protection to them. If the construction of the instrument be doubtful, courts will not be anxious to construe it in a manner which would defeat the end which the parties to it must have had in view.

But even if the construction claimed for the instrument by the defendant were the true one, the complainants are entitled to maintain this suit.

The indorsers, before themselves paying the debt, might have filed their bill against the principal debtor, to enforce specific performance of his covenant to indemnify them, and to have the mortgaged property applied for that purpose: — 1 *Story Eq. Juris.* §§ 327, 639; *Rice Ch.* 286; 6 *Blackf.* 491; 2 *Head*, 549; 36 *N. H.* 217; 13 *Vt.* 88; 4 *Jones Eq.* 212; 2 *Rich Eq.* 179; *Ibid.* 22.

Whatever may be the rule at law, courts of equity consider and treat a security given by the debtor, to either the surety or the creditor, as held in trust for the other — not in virtue of any supposed agreement of the parties to that effect, but because substantial justice and equity requires it. It is a fund appropriated by the debtor for the payment of the debt, and regardless of, and even in opposition to, the expressed intentions of the parties, a court of equity will appropriate the fund directly to its ultimate destination, whenever, from the insolvency of the parties, or other cause whatever, it is manifest that substantial justice cannot otherwise be accomplished: — 1 *Johns. Ch.* 119; 3 *Ired. Eq.* 520; 1 *S. & M. Ch.* 559; 11 *Conn.* 118.

If this mortgage cannot be foreclosed until the indorsers have paid the debt, then the complainants are remediless. That Marvin & Stevens are insolvent, there is no doubt. Ladue has no property except that covered by this mortgage.

We could not levy an execution on the mortgaged property: — *Comp. L.* § 3158; 4 *B. Monr.* 142; 11 *Conn.* 121.

And the result of the defendant's doctrines is, that

Digitized by Google

Ladue has, by this mortgage, effectually locked up this property where neither the complainants nor any other creditor can reach it. The indorsers are unable to pay the debt, and thereby entitle either themselves or the creditors to foreclose the mortgage. If we should obtain judgment and issue execution against the indorsers, they have no property subject to execution, and would sustain no more loss or damage than they have sustained already.

A. Russell for defendant Ladue:

1. This is solely an indemnity mortgage, "*to save harmless*" Marvin & Stevens from loss, cost and damage, and to pay *so as to indemnify* said Marvin & Stevens; and it could only be foreclosed on payment by the mortgagees.

The reading of the mortgage shows the intention of the parties; that it was intended as collateral to the covenant to indemnify, and not as a trust for the payment of the debt, or for its better security. It was solely for the protection of Marvin & Stevens, who had already become indorsers for Ladue, and who were expected to indorse for him in larger amounts.

2. Complainants can only be *subrogated* to the rights possessed by the mortgagees: — *Adams' Equity*, 269; 14 *S. & M.* 87. The mortgagees being indemnified against "loss, cost and damages," it would be necessary for them to prove, in order to sustain an action against Ladue, that they have suffered actual pecuniary loss: — *Sedg. on Dams.* 303 *et. seq.*; *Cowp.* 525; 8 *Johns.* 249; 10 *Wend.* 498; 3 *Denio*, 321; 1 *Zab.* 73; 1 *Comst.* 550; 11 *Ill.* 218; 9 *Barr*, 366; 11 *Ala.* 702; 7 *Blackf.* 464; 1 *Chip.* 164; 3 *Vt.* 532; 3 *Wheat.* 89; 7 *Ind.* 213; *Thurston v. Prentiss*, 1 *Mich.* 193; *Mich. State Bank v. Hastings*, 1 *Doug. Mich.* 251, 256; *Griggs v. D. & M. Railway Co.*, 10 *Mich.* 117.

3. It is however claimed that, by some operation of law, and in spite of the parties to the mortgage, a trust

Digitized by Google

arises immediately on its execution, in favor of creditors not existing at the time, but coming into existence afterwards. The following cases decide the precise point at issue under this head, and are decisive of the case: — 7 *Conn.* 478; 18 *Ohio*, 35; 14 *S. & M.* 87; 10 *Leigh*, 206; 6 *Conn.* 37; 9 *S. & M.* 450; 1 *Wash. Real Prop.* 574; *Story Eq. Juris.* § 635; 1 *Lead. Cas. in Eq.* 163, 164, *American note to Derring v. Winchelsea.*

But the bill in reality is a bill to reach the equitable assets of the principal debtor, and is in the nature of a creditor's bill. To entitle a party to file a bill of this character, and obtain the relief sought by it, it is well settled that he must show that he has exhausted his legal remedies: — *Mitf. Eq. Pl.* 128; *Story Eq. Juris.* § 1216. The proper evidence of this is the production of a judgment against the principal debtor, and execution upon it returned unsatisfied: — *Wal. Ch.* 1, 62, 28; *Barnes v. Baker*, 2 *Mich.* 380.

[Counsel also argued that it did not appear, from any thing in the case, that complainants have not a full, adequate and complete remedy at law; that the proof showed Ladue to have had, at the time of filing the bill, property more than sufficient to satisfy complainants' demands, openly and notoriously in his possession and under his control.]

BY THE COURT:

The bill in this case was filed to foreclose a mortgage, which is claimed by defendant to be one of indemnity, upon which no relief could be asked until the parties should be damnified by paying the debts secured. Complainants, on the other hand, claim that the mortgage was conditioned not only to indemnify after damage, but to pay the debts; and that a right of action accrued at once on non-payment, as decided in *Hall v. Nash*, 10 *Mich.* 303.

The mortgage, after an ordinary condition to indemnify and save harmless, proceeds: "and if said party of the

Digitized by Google

first part shall promptly pay and discharge all notes or other papers of his upon which said parties of the second part shall or may become indorsers or acceptors, together with all interest, costs and charges accruing thereon, so as to save said parties of the second part harmless by reason of their connection with such paper," &c.

This is a clear and unequivocal condition to pay, and the condition was broken at once upon a failure to meet the paper at maturity. And upon this breach a right of foreclosure arose, without further action on the part of the mortgagees.

The power of sale appended to the mortgage is undoubtedly limited to the case of the mortgagees being damnified, by paying the debts which the mortgagor failed to pay. But the power of sale, although usual, is no necessary part of the mortgage, and need not be co-extensive with its conditions. It cannot do away with any condition actually expressed, and could only be resorted to for explanation where there should be some ambiguity requiring such aid. This mortgage is not ambiguous; and the remedy in equity is open for every breach of condition, whether the parties have seen fit to provide for it or not by the power of sale, which is a private remedy by contract, and may be narrowed by agreement to any extent desired.

Complainants, therefore, had a good cause of action, and the decree in their favor is affirmed, with costs.

William W. Smith v. Preston Mitchell.

Assignment for the benefit of creditors: exception of exempt property.— An assignment for the benefit of creditors is not void on its face for excepting property exempt from execution without specifying it. A bona fide selection is as practicable here as under a levy.

Digitized by Google

SMITH v. MITCHELL.

Interference with the property by the assignor.—Where a general assignment for the benefit of creditors was assailed as fraudulent, it was held, that evidence that, at the time it was made, goods were at a railroad depot, directed to the assignors, which they claimed and disposed of afterwards, was competent, as having a bearing on the good faith of the assignment.

Evidence that said goods were afterwards sold with the knowledge and assent of the assignee, is competent, as tending to establish fraud.

Conversion: proof of auction sales as evidence of value.—Evidence of what the property brought at an auction sale made shortly after the alleged conversion for which suit is brought, is competent as having some tendency to prove its value.

Conversion: evidence of prior liens.—Trover by assignee for property levied upon by defendant by virtue of executions against the assignor. Held, that evidence on behalf of defendant, that property levied upon was held and sold under a former levy, was admissible, to show that defendant had not damnified the plaintiff, and had not converted the goods.

Held, also, that evidence that goods levied on were held and sold for railroad charges which were a prior lien, would discharge defendant from any liability on account of the goods so sold; *first*, because showing that they were incumbered to their value: and *second*, because showing that he never took or converted them, the lien being adverse, and he never completing his levy by possession.

General assignment must be of all the property.—A voluntary assignment for the benefit of creditors, purporting to be general, is void, if it does not fairly and bona fide assign all of the assignor's property which is liable for the payment of his debts.

Heard April 15th. Decided December 5th.

Error to Calhoun Circuit.

Mitchell brought suit in trover, to recover the value of certain furniture, which he claimed under a general assignment made to him by Increase A. &. William H. Pendleton, composing the firm of I. A. Pendleton & Son, for the benefit of their creditors, and which defendant was alleged to have converted to his own use on 24th August, 1857, the date of the assignment. Defendant justified taking the property as constable, by virtue of executions issued against the Pendletons.

On the trial, the assignment was offered in evidence. It purported to assign "all of our stock in business, goods, chattels, merchandize, bills, bonds, notes, book accounts, claims, demands, and the securities taken for the same, except, however, our household furniture and property exempt by law from execution. The same being enumerated and set forth in a schedule hereto to be attached,

Digitized by Google

marked schedule A." Defendant objected that the assignment was void on its face, for the reason that the exempt property was not set apart from the stock, nor reserved, but was to be set apart by a schedule to be attached: but the Court overruled the objection.

The schedule of property attached to the assignment mentioned, among other things, "bill of chairs at depot, invoiced at $217.50, and freight to be deducted." This was the only property described as being at the depot, and no moss was mentioned in the schedule. I. W. Wilder, a witness for the plaintiff, testified that the assignment was executed in his presence. "Schedule was made, and I think attached to the assignment at the time — am not positive about it. The schedule was with the assignment, and it is my impression it was attached to it at the time. I. A. Pendleton, Preston Mitchell and myself were present at the time. Mr. Pendleton pointed out the furniture to Mitchell, and they walked around and looked at it. There was some conversation between them about the value of some of the articles. Mitchell went on giving directions to Pendleton for letting the property remain where it was. Account books and papers were taken from the desk by Pendleton, and Mitchell took some of them and looked at them, and handed them back to Pendleton, or laid them on the desk before him, and Mitchell gave directions as to opening or keeping new accounts of business. I don't think the intimation was very definite; the purport of it was to keep business separate from the old. Pendleton stated that he delivered the property to Mitchell: when Pendleton mentioned the property at the depot, Mitchell made some reply about its remaining there. The freight was not paid on that. Papers purporting to be invoices of the property at depot were handed to Mitchell."

On cross examination he said; "Mitchell went to the shop with me, and the assignment was signed by one, I think by both, there; books taken down appeared to be

Digitized by Google

account books used in the shop; don't recollect any other books; papers purporting to be invoices of property at the depot were taken down; other papers folded up like accounts or notes were taken down; my impression is Mitchell looked them over, and it is my impression Pendleton put them back; I saw young Pendleton at the shop before I left. There was some varnish, whitewood lumber, cherry and black walnut there, which Pendleton claimed exempt, and said he was going to work. I think there were two kegs partly full of varnish; may have been three. On being asked, what directions did Mitchell give? he answered; he told I. A. Pendleton to take care of the property, books, papers, &c., and sell what he could, but not on credit; directed the goods at depot to be brought up as soon as money enough should be realized to pay the charges. All three, Mitchell, I. A. Pendleton & Son, were present at the time assignment was delivered. Heard Pendleton tell Mitchell there was the key; Mitchell told Pendleton to keep it. Mitchell had started towards the door; I did not see the key."

I. A. Pendleton testified, that he was of the firm of I. A. Pendleton & Son; that he was at shop at time referred to by Wilder; that articles were pointed out to Mitchell, the assignee, and moved in some instances in the shop so Mitchell could view them; all the property was in the sales room except that at the depot; books and papers laid on the desk and pointed out to Mitchell; of the goods at depot, Mitchell said the goods must remain at depot until money was realized to pay freight, which was something over $40. Invoices of goods at depot were given up to Mitchell; witness gave him up the key; that it was his impression Mitchell took the key to the shop; Mitchell told him he must stay there in the shop, as his business was such he, Mitchell, could not. Mitchell gave him general orders to collect. Mitchell owned the building the goods were in. Witness gave up possession to

Digitized by Google

Mitchell when he made the assignment. He occupied it under Mitchell, but has not occupied it as his lessee since. Said he did not sell anything before the levy made by defendant, some three or four days after the assignment. That Mitchell went out after goods were shown as above, that he came in the next morning, was there a moment or two, and his impression is he was there every day. That I. A. Pendleton & Son had no moss at the depot at the time of the assignment that witness was aware of.

W. H. Pendleton also testified, that the firm had no moss at the depot, to his knowledge, at the time of the assignment.

The plaintiff having rested, the defendant offered in evidence the executions under which he justified, with indorsements thereon showing levies on the property in controversy, and returns of public sales of some of it, made since the commencement of the present suit. The returns were objected to by the plaintiff, and excluded by the Court.

The defendant then proved by James A. Way that, during the year 1857, he was an agent of the Michigan Central Railroad Company, and had charge of the freight office and depot at Marshall; and the defendant then offered to prove that there were two bales of moss of the value of $50 at said depot, on the 23d and 24th days of August, 1857, directed to I. A. Pendleton & Son, and afterwards claimed by them, and one of them taken away on the first day of September, 1857.

But to the introduction of such testimony, the plaintiff objected, and insisted that the same was irrelevant, and that the assignment did not cover that property; that it did not appear that I. A. Pendleton & Son ever ordered any such property, or property of that kind, but the contrary; and if there was any property of that kind there it does not appear whether it was there for them, or that the assignee knew or had any knowledge or notice of

Digitized by Google

it. The Court sustained the objection, and the defendant excepted.

The defendant then offered to prove by another witness, that I. A. Pendleton, on the first day of September, 1857, disposed of one bale of moss above referred to, at the depot, in payment of a debt of I. A. Pendleton & Son, and paid said debt in full, and under such circumstances as to leave no doubt it was done with the knowledge and consent of the assignee. To such testimony the plaintiff objected, for the reason the defendant did not offer to show the property was covered by the assignment, and that it was anticipating the conclusion of the jury upon circumstances proposed to be proved, and that such proposition does not directly show that such transfer and payment was with the knowledge and consent of the assignee; and the objection was sustained by the Court.

The Court at the same time informed the defendant's counsel, that if they proposed to show that the assignors, or either of them, disposed of any of the assigned property after the assignment, with the consent of the assignee, they might show it.

The defendant then offered to prove by another witness, that the property mentioned in plaintiff's declaration was fairly sold at public auction, in the month of September, 1857, at a constable's sale duly advertised according to the statute, at Marshall, and what prices the said articles brought at such auction, for the purpose of showing the value of the articles. This evidence was objected to as irrelevant, and rejected by the Court.

The defendant further offered to prove a prior levy on the property to that made by himself, by virtue of another execution against I. A. Pendleton & Son, and that the officer making the same took from him a large share of the property levied upon, to the value of two hundred dollars, and that the defendant never sold the same. This testimony was also rejected as irrelevant.

Digitized by Google

The defendant further offered to prove by the witness Way the amount of freight and charges on the goods at the depot, that a portion of them, referred to in the assignment, were openly and fairly sold at public auction, after five days public notice, in April, 1858, to pay freight on the same, and charges of Michigan Central Railroad Company, and what price or prices they brought at such sale. The plaintiff objected to such evidence as irrelevant, and that it was incompetent to show what was done with the property after the taking by the defendant; also that it was an improper method of showing value if allowed with that view; also, that such sale, if any was made, was after the commencement of this suit. The Court sustained the objection.

The evidence being concluded, the defendant requested the Court to charge the jury, that the assignment is void on its face, for the reason that it leaves the property under the control of the assignors, to the extent of the exemption, said exempt property not having been set apart previous to such assignment; also that if the jury shall find that the assignors did not fairly, *bona fide* assign all their property liable for the payment of their debts, then the assignment is fraudulent and void against the defendant, who stands in the place of a creditor. Which requests were declined by the Court. The Court did charge, among other things, that if the jury should find that the assignment was made with the intent, on the part of the assignors, to hinder, delay or defraud creditors, then the same is void, whether the assignee knew of such intent or not.

The jury returned a verdict for the plaintiff.

W. H. Brown and *C. I. Walker*, for plaintiff in error:

1. The defendant below offered in evidence his own return on the execution, by virtue of which he levied

Digitized by Google

on the property, to show what disposition was made of the property seized.

This was an official act by defendant, under his oath of office, and from the nature of the case, and its necessity, is admissible, even as against third parties, although made after action brought:—3 *Cow. & Hill's Notes*, 1083-6; 18 *Vt.* 67; 6 *Fost.* 99; 11 *Fost.* 9.

2. We submit that the Court erred in rejecting the evidence as to the moss at the depot. It seems that plaintiff below had offered evidence that the assignors had no moss at the depot. Defendant offered evidence, tending to prove that they had such moss, and that, within a few days after the assignment, they, the assignors, disposed of it for the purpose of paying a particular debt, under such circumstances as to leave no doubt that it was done with the knowledge and consent of the assignee.

The testimony certainly tended to show that the assignors had certain property belonging to them, and covered by the assignment, which was not mentioned in the schedule, and which they disposed of for their own purposes after the assignment, with the assent of the assignee; and so far had a tendency to prove the assignment to be fraudulent in its character.

The error is in no way cured by the subsequent offer of the circuit judge. The offer is sophistical, and does not meet the proposition made. He will permit it to be proved that the assignors disposed of *assigned* property. But the very thing in controversy was, whether this was *assigned* property, and this was a question for the jury.

3. The Court clearly erred in excluding the testimony offered for the purpose of showing the price for which the articles sold, at a fair advertised sale, at public auction, by a constable.

Such testimony, although not conclusive, is admissible; and there is an especial propriety in its introduction, where the plaintiff is an assignee, whose duty it is to dispose of

Digitized by Google

the property promptly, and ordinarily in the same manner: *Doug.* 40; 3 *C. & P.* 344; 6 *C. & P.* 712; 9 *B. & C.* 696; *Sedgw. on Dam.* (1 *Ed.*) 502; 13 *M. & W.* 507; 2 *Hilt.* 137; 20 *N. Y.* 499.

4. There was error in excluding evidence of a lien for freight and charges, on a portion of the very goods in controversy, by the R. R. Co., and that a portion was sold to pay such lien: — 2 *Greenl. Ev.* § 635, *note* 2; 14 *Pick.* 361; 13 *Met.* 267; 20 *Penn.* 40; 9 *Pick.* 551.

5. We submit that the offer to prove a prior levy on a portion of the goods, and the disposition of them thereunder, tended to contradict any conversion by the defendant. When he made his paper levy, they were in the possession, not of the plaintiff, but of another constable, by virtue of a levy, and that constable sold the goods.

Mr. Brown further argued, that the exception in the assignment of "our household furniture and property exempt from execution" rendered it void. The exception was *partnership* property, because partnership property only had been assigned. And the construction of the assignment must be, that *no* household furniture was assigned.

H. A. & L. G. Noyes and *Hughes & Wooley*, for defendant in error:

1. There are no illegal reservations in the assignment. It excepts only such property as is exempt from execution. The evident intention was to convey all their property not exempt from execution.

But even if the assignment is to be construed as excepting household furniture liable to execution, its validity is not affected. It would be good and valid as a partial assignment: — *Burr. on Assignments*, 97; 13 *S. & M.* 22; 5 *T. R.* 420.

Nor is it necessary that the exempt property should be specified: — *Hollister v. Loud*, 2 *Mich.* 323.

Digitized by Google

It was not allowable for the Court to say, that the assignment was void on its face, unless it contained such illegal provisions as are not reconcilable on any possible hypothesis with an honest intention; and if the instrument can by any possible construction be sustained, it is the duty of the Court to give it that construction:—*Oliver v. Eaton*, 7 *Mich.* 108; *Gay v. Bidwell*, 7 *Mich.* 523; *Nye v. Van Husan*, 6 *Mich.* 329.

2. The Court correctly rejected the return of the defendant on the executions.

All that was objected to, was the disposition which the defendant had made of the property *since* the commencement of this suit.

3. The order in which proofs are to be received, must, in jury cases, be left legally to the discretion of the Court; and it is the duty of the Court to compel counsel either to introduce their proof in such order that every part of it shall appear from the case itself to be relevant; or, if this is departed from, to require counsel when a fact, the relevancy of which does not appear, is offered, to give some assurance to the Court that they intend to connect the fact with the case so as to make it relevant:—1 *Greenl. Ev.* § 57.

The bill of exceptions shows that the facts offered to show that the assignors disposed of assigned property were offered as evidence in themselves, without anything to show the knowledge or assent of the plaintiff (assignee), and that the defendant substantially admitted that he could not charge the assignee with knowledge of the transaction. The Court laid down this rule:

"That the defendant might show that the assignors, or either of them, disposed of the assigned property after the assignment, with the consent of the assignee."

This rule, we insist, is the correct one; and the Court therefore, rejected the evidence, the defendant not being

Digitized by Google

able to say that he expected to show such consent of the assignee.

There is no error, then, unless the defendant was entitled to show the acts of the assignors after the assignment, done without the knowledge or consent of the assignee; and upon this question the authorities are very clear and uniform: — *Burr. on Assignments*, 401; 6 *Barb.* 94; 1 *Met.* 10.

4. The true rule of damages was the market price, and this could only be proved by the opinion of witnesses, and such transactions as go to make up the market value. A sale on execution, whether of the same or similar property, was not admissible. The price obtained at the execution sale is not itself the rule of damages, and is too remote to be evidence of the market value: — 2 *Pars. on Cont.* 482.

5. The Court did not err in refusing evidence that the property, after it was converted by the defendant, was taken away from him, by virtue of a senior levy. The Court properly refused to try any collateral issues between third parties, and it is no excuse for one wrong doer that the property has been taken away from him by another.

6. The sale by the railroad company, for freight, was utterly irrelevant, either for the purpose of showing market price or in mitigation. It may possibly have been competent to show the amount of the lien on the goods for the freight, but it does not appear that this was refused, and if it was, no error is assigned for such refusal.

7. The refusal of the Court to charge as requested must be taken in connection with what he did charge on the subject; and the whole instructions to the jury upon the subject were correct: — *Burr. on Asst.* 300 *and* 301.

BY THE COURT:

The assignment is not void on its face for excepting property exempt from execution, without specifying it. A *bona fide* selection is as practicable here as under a levy.

Digitized by Google

Evidence that goods were at the railroad depot, directed to the insolvent firm, which they claimed and disposed of after the assignment, was improperly excluded, as it had a bearing on the good faith of the assignment as a general assignment.

The sale of said property by the firm, and evidence showing the assignee's knowledge and consent, should not have been excluded, as it bore upon the question of fraud.

Evidence of what the property brought at auction is admissible, as having some tendency to prove value.

Evidence that the property levied on was held and sold under a former levy, was admissible to show that the constable had not damnified the claimant, and had not converted the goods.

Evidence that goods levied on were sold for charges which were a prior lien, would discharge the constable from any liability on account of those goods, on two grounds: *first*, that they were incumbered to their value; *second*, that he never took or converted them; the lien being adverse, and he never completing his levy by possession.

The Court erred in not charging that the assignment was void if it did not fairly *bona fide* assign all of the assignors' property liable for the payment of their debts.

Judgment reversed, and new trial ordered.

The People, on the relation of George W. Blair v. The Quartermaster General.

Bounty: discrimination between volunteers.— A man drafted into the United States service for nine months, but allowed to volunteer and to be mustered in for three years, is entitled to the State bounty offered to volunteers. While the bounty is being paid, no discrimination can be made among those who come within the terms of the offer.

Heard and decided December 5th.

Digitized by Google

THE PEOPLE v. THE QUARTERMASTER GENERAL.

Motion for a mandamus.

The relator, on the thirteenth day of May last, was mustered into the United States service as a volunteer in the fifth Michigan battery, for the full term of three years. Immediately previous to this he had been accepted and mustered in as a substitute for a drafted man from this State, for the term of nine months.

The State authorities were at this time offering a bounty of fifty dollars to each volunteer, under an act of the Legislature, approved March 6th, 1863 — *Laws* 1863, *p.* 60. The order of the Adjutant General under which this offer was made, directed the bounty not to be paid to drafted men or their substitutes; and the only question in the case was, whether the relator, having been accepted and mustered into the service in the place of a drafted man, for nine months, was entitled to the bounty on being afterwards accepted as a volunteer for three years, before the nine months had expired.

Robinson & Brooks for the relator.

A. Williams, Attorney General, contra.

The COURT held, that if the relator was allowed, after taking the place of a drafted man, to enlist as a volunteer, and was accepted and mustered in as such, the State authorities could not, in the matter of bounty, distinguish him from any other volunteer. While bounties were offered they must be paid without discrimination to all who came within the terms of the offer.

Mandamus granted.

Digitized by Google

JANUARY TERM, 1864, AT LANSING.

George Richmond v. James H. Robinson and others.

Land contract: specific performance: failure to pay by the day. — A contract was made for the sale of lands, the payments to be made to a third person who held a mortgage given by the seller. Payment was not made by the day, and the seller declared the contract forfeited. The purchaser subsequently paid the money to the mortgagee, but without the seller's assent. It appearing that the land contract was designed to provide for the payment of the mortgage, it was held that, when that was done, as it did not concern the seller whether the mortgage was paid one way or another, the contract was to be regarded as substantially complied with.

Failure to pay taxes.—By the contract the purchaser agreed to pay all taxes. The bill did not aver that he had done so. Held that, the purchase price having been paid, the seller had no concern with the payment of taxes, as he could not be compelled to warrant against them, and he did not aver or pretend that he had been made personally liable for them.

Time, when essential.—Time cannot be made essential in a contract merely by so declaring, if it would be unconscionable to allow it. Parties may stipulate to make it so, where the stipulation is reasonable; but, as in stipulated damages, if the stipulation is not reasonable, courts will not regard it.

Release of dower cannot be compelled.— The wife cannot be compelled to release her dower in lands which her husband has contracted to sell; and she is not a proper party to a bill by the purchaser for a specific performance.

Heard November 6th, 1863. Decided January 8th.

Appeal in Chancery from Ionia Circuit.

The bill was filed by Richmond, who was assignee of Rufus K. Barlow, against Robinson and his wife, and said Barlow, to compel the specific performance of the following contract, and a conveyance of the land therein described, by Robinson and wife to complainant.

"Articles of agreement made the thirteenth day of March, in the year of our Lord one thousand eight hundred and fifty-eight, between James H. Robinson of the

Digitized by Google

county of Ionia, and State of Michigan, party of the first part, and Rufus K. Barlow of the county of Ionia, and State of Michigan, party of the second part, witnesseth as follows:

"First. The said party of the first part, in consideration of the sum of one thousand dollars to be paid to the said party of the first part, and of the covenants to be performed by the said party of the second part as hereinafter expressed, hereby agrees to sell to the said party of the second part, all that certain piece or parcel of land known and described in the government survey as the east one-half of the south west fractional quarter of section twenty-six, township five north, of range seven west, containing eighty acres more or less, with the privileges and appurtenances thereunto belonging.

"Second. The said party of the second part, in consideration of the covenants herein contained, on behalf of the said party of the first part, agrees to purchase of the said party of the first part the above described land, and to pay for the same to the said party of the first part or his legal representatives or assigns, the said sum of one thousand dollars lawful money of the United States, in the manner following, that is to say; fifty-four dollars and seventy-three cents the first day of September, A. D. 1858, to James H. Robinson. Three hundred and seventy-one dollars and ninety-three cents to George R. Weeks of Seneca county, Ohio, or his assignee, the twenty-third day of September, eighteen hundred and fifty-eight; two hundred and eighty-six dollars and sixty-six cents to George R. Weeks or his assignee, the twenty-third day of September, A. D. 1859; two hundred and eighty-six dollars and sixty-six cents to George R. Weeks or his assignee the twenty-third day of September, eighteen hundred and sixty, with the interest to be computed from the date of these presents, at and after the rate of seven per centum per annum on the whole sum that shall be from time to

Digitized by Google

time unpaid and to be paid, both principal and interest annually to be paid.

"And also that he will, so long as any part of the principal or interest of the said consideration money remains unpaid, well and faithfully in due season, in each and every year, pay or cause to be paid all taxes and assessments, ordinary and extraordinary, that may for any purpose whatever be levied or assessed on said premises or on this contract, and that he will not commit or suffer any other person to commit any waste or damage to the said land or the appurtenances.

"Third. The said party of the first part further covenants and agrees with the said party of the second part, that upon the faithful performance by the said party of the second part of the covenants and agreements by him to be performed, and upon the payment of the several sums of money before mentioned, and the interest thereon, at the times and in the manner and at the place before mentioned, to the said party of the first part, in person or by attorney duly authorized, that thereupon the said party of the first part will well and faithfully execute and deliver a deed of warranty of the above described premises, with the appurtenances thereunto belonging.

"Fourth. It is further mutually covenanted and agreed by and between the said parties hereto, that the said Rufus K. Barlow may enter on the said land, and remain thereon and cultivate the same as long as he shall fulfil and perform all the agreements hereinbefore mentioned on his part to be fulfilled and performed, and no longer; and that if he shall hereafter at any time violate or neglect to fulfill any of said agreements, he shall forfeit all right or claim under this contract, and be liable to the said James H. Robinson for damages, and shall also be liable to be removed from the said land in the same manner as is provided by law for the removal of a tenant that holds over after the expiration of the time specified in his lease.

Digitized by Google

And it shall be lawful for the said party of the first part, at any time after the violation or non-fulfillment of any of said agreements on the part of the said party of the second part, to sell and convey the said land or any part thereof, to any other person whomsoever; and that the said party of the first part shall not be liable in any way, nor to any person, to refund any part of the money which he may have received on this contract, nor for any damages on account of such sale. And it is hereby expressly understood and declared that time is and shall be deemed and taken as of the very essence of this contract, and that unless the same shall in all respects be complied with by the said party of the second part, at the respective times and in the manner above limited and declared, that the said party of the second part shall lose and be debarred from all rights, remedies or actions, either in law or equity, upon or under this contract."

The pleadings and evidence in the case are sufficiently stated in the opinion of Justice MANNING. The Court below made decree for complainant as prayed.

Blanchard & Bell, and *C. I. Walker*, for complainant, to the point that time is of the essence of the contract when there is an express stipulation to that effect: — 11 *Paige*, 354. That when the géneral intention of the parties can be carried into effect the court relieves against any forfeiture: — *Ibid.* 358. That where a vendor has waived a forfeiture by receiving partial payments afterwards, he can not suddenly stop short and insist upon a forfeiture for non-payment of arrears, without any previous notice of his intention so to do: — 8 *Paige*, 423; 3 *Meriv.* 84; 1 *Johns Ch.* 379; and that when such notice is given, the vendee should have a reasonable time afterwards to pay the arrears: — 8 *Paige*, 607; 5 *Wis.* 206.

Digitized by Google

A. Williams, for the defendants Robinson and wife:

1. The bill nowhere alleges the payment of taxes, or the non-commission of waste or damage; and, therefore, wholly fails to show some of the essentials of the complainant's right or title to what he claims by his bill.

2. By the terms of the contract, it was "expressly understood and declared that time is and shall be deemed and taken as of the very essence of this contract." And parties may contract on what terms they will, and may declare, if they think fit, that time shall be considered essential. Nor can courts any more dispense with punctuality as to time than with any other part of the agreement: *Adams Eq.* 88 *and note; Story Eq. Juris.* § 776 *and note* 1; 14 *Pet.* 172; 1 *Johns. Ch.* 378; 4 *Ves.* 686; 13 *Ves.* 225; 4 *Mich.* 570; 4 *Bro.* 469; 3 *Madd.* 440; *Sudg. on Vendors*, 286; 5 *Ves.* 520, *note;* 7 *Paige*, 22; 11 *Paige*, 352; 4 *Sandf. Ch.* 374; *Ibid.* 525.

3. The bill fully discloses a default on the part of the complainant, with respect to the payment due September 23, 1859. But it nowhere alleges a waiver, or even a request of waiver of such default; which waiver, if made, is a part of the complainant's case, to be stated in his bill; and, if not stated, the defect can not be cured by proof, or defendant's answer: — 6 *Mich.* 133; 7 *Mich.* 334; 8 *Mich.* 115; 11 *Mich.* 9.

4. The allegation of tender or surrender of said notes and mortgage — a part of the complainant's right or title to recover — is bad. The offer was to deliver them "up to the said James H. and Alma Robinson, on the execution and delivery by them to your orator, of a deed of the premises hereinbefore mentioned and described." But Mrs. Robinson was not a party to the contract, or in privity with it, and was in nowise liable upon it. She had a right of dower, and could not thus, without consideration, promise, or engagement on her part, be required to join

Digitized by Google

in such deed. No act of her husband, not assented to by her, could obligate her to do so: — 2 *Doug. Mich.* 141; 1 *Mich.* 1; 6 *Mich.* 470; 8 *Barb.* 618; 3 *Paige*, 483, 503.

The tender, or offer of surrender of said note and mortgage, was, therefore, destroyed by the incorporation of an element or condition not promised in the contract, but wholly foreign to it.

Weeks had no power to waive the forfeiture, or revoke the annulment of the contract. If Richmond paid, it was with his eyes open, and at his peril; if Weeks received payment, it was without authority, and in violation of Robinson's express and known directions: — 10 *Wend.* 88; 10 *Wend.* 156; 1 *Hill*, 145; 3 *Denio*, 321.

In no event is the complainant entitled to a decree against Mrs. Robinson, requiring her to join in a conveyance of the premises to the complainant: — 6 *Wend.* 9; 10 *Paige*, 342; and authorities cited under 4th point *supra*.

MANNING J.:

Bill for the specific performance of a contract for the sale of land. Robinson, being the owner of the real estate mentioned in the bill, on the 30th December, 1856, with his wife mortgaged the same to George R. Weeks, to secure the payment of three promissory notes, given by himself and wife to Weeks, on the 20th September, 1856, for $286.66 each, payable as follows: one on the 20th September, 1858, one on the 20th September, 1859, and one on the 20th September, 1860, with annual interest. On the 13th March, 1858, Robinson entered into articles of agreement with one Barlow, to sell and convey the mortgaged premises to Barlow, on Barlow's paying Robinson $54.73 on the 1st September, 1858, and paying to Weeks the three promissory notes secured by the aforesaid mortgage, with interest from the date of the aforesaid articles of agreement. On the 6th September, 1858, Barlow assigned

Digitized by Google

the contract to Richmond, who, on the 9th November following, paid the first note due to Weeks, and on the 15th day of the same month paid to Robinson the $54.73 going to him. On the 21st November, 1859, Richmond paid Weeks the further sum of $180. On the 12th April, 1860, Robinson served a written notice on Richmond of the forfeiture of the contract, and to quit the premises. Richmond afterwards, and in the same month, paid Robinson's mortgage and notes to Weeks, and tendered them to Robinson, and demanded a deed.

Several questions were made on the argument which I will now proceed to consider.

First. That the bill is defective in not alleging payment of taxes, and the non-commission of waste; and that no decree can therefore be entered upon it. By the articles of agreement, the vendee was to have possession of the land, and was to pay all taxes and assessments, and not to commit or suffer waste or damage to the land. And on the performance by him of the covenants and agreements to be performed by him, the vendor was to convey. The bill does not allege the payment of taxes, or the non-commission of waste. This is the ground of the objection. No allegation of the non-commission of waste was necessary, as it required no act to be done by the vendee, and the presumption of law in such cases is, that the party has not done the prohibited act. The payment of taxes stands on different ground, as it is an act to be done, and not one to be abstained from. It differs from the other acts to be done by the vendee, in that it s an undertaking to perform a public duty for the vendor. The duty must, however, exist before the obligation arises. The land may not have been assessed, and the existence of a tax is therefore not to be presumed. It must be shown by way of defense; and payment need not be averred in the bill.

The next objection is, that by the terms of the con-

Digitized by Google

tract, it was expressly understood and declared that time is and shall be deemed and taken as of the very essence of the contract. Time is always of the essence of a contract when an act is required to be done within a specified time; as much so as the act itself, and no more. Every part of a contract is of its essence. It is not very clear what courts and text writers who use this phrase mean, unless it be that a subsequent performance can not be decreed, under all the circumstances of the case, by a court of equity, by way of relieving against the forfeiture of the contract, without doing injustice to the party against whom the relief is asked. This is the principle equity acts on in relieving against forfeitures. Nor will it, by any stipulation of the parties, be ousted of its jurisdiction, or refuse to relieve against the exaction of the pound of flesh, although the parties have, in express terms, stipulated for it.

The first payment was not made within the time required by the contract, and no forfeiture was declared or insisted upon. In November following the forfeiture in September, both Robinson and Weeks were paid, Robinson receiving the money for Weeks as well as that which was going to himself. On the 21st November, 1859, $180 more were paid on the second payment to be made to Weeks — making the whole amount paid complainant $649.98. In April following, the notice of forfeiture, and for complainant to quit the premises, was given by Robinson. Thereafter, and during the same month, Richmond paid the balance due on the notes and mortgage to Weeks, the last note not being due until the following September. The object of the notice to quit from Robinson is too obvious not to be seen. It was to make $649.98 out of complainant. He had suffered no loss whatever, and Weeks, to whom the money was going, made no complaint. And after the notes and mortgage had been paid, the payment of which appears to have been

Digitized by Google

the object he had in view in selling the premises, he refused to convey. A stronger case could not well be presented for the interposition of a court of equity.

The third objection is, that Mrs. Robinson was not a party to the contract, and should not, therefore, be required to unite with her husband in the deed to complainant. This objection is well taken, and the bill must be dismissed as to her. But it is no answer to the refusal of Robinson to convey, when the notes and mortgage were offered to him and a deed demanded; for he did not place his refusal on the ground that his wife was required to unite with him in the conveyance. Had he done so, the execution of the deed by her might have been waived. His objection was, the forfeiture of the contract, and that complainant had no rights under it. Nor was Weeks a necessary party to the bill. The payment of the notes and mortgage by complainant discharged Robinson's indebtedness to Weeks, and he had no interest in having the mortgage discharged of record; and if he had, Weeks would be bound to acknowledge payment of it on request. The decree should require complainant to deliver up the notes and mortgage to Robinson, on receiving the deed from him.

The bill should be dismissed as to Mrs. Robinson, and the decree be so reformed as to Mr. Robinson as to require complainant to deliver the notes and mortgage to him, on receiving the deed from him. Neither party to have costs against the other.

CAMPBELL J.:

We think the contract in this case was designed (as appears from the circumstances and from its terms) to provide for the payment of the mortgage to Weeks. It could not in any way concern Robinson whether the mortgage was paid in one way or another. It only concerned him to get it satisfied; and, inasmuch as that has

Digitized by Google

been done, the contract has been substantially complied with. The objection that it does not appear the taxes have been paid, stands on the same footing with the one alleged, that the contract to pay the mortgage was not literally performed. When Richmond paid for the land, and became thus entitled to a conveyance, the non-payment of taxes could injure no one but himself; and Robinson could have no concern with it, as he could not be compelled to warrant against them, and does not aver or pretend that he has been made personally liable for them. Such covenants may doubtless become material, but not in such a case as the present.

Time cannot be made essential in a contract, merely by so declaring, if it would be unconscionable to allow it. Parties may stipulate to make it so, where the stipulation is reasonable; but, as in stipulated damages, if the stipulation is not reasonable, courts will not regard it.* For these reasons I concur in the results arrived at by my brother Manning. So far as Mrs. Robinson is concerned, no decree can be rendered against her, for the reasons he has stated, in which I agree with him.

MARTIN CH. J. and CHRISTIANCY J. concurred in this opinion.

* See *Jaquith v. Hudson*, 5 *Mich.* 123; *Davis v. Freeman*, 10 *Mich.* 188; *Daley v. Litchfield*, 10 *Mich.* 29.

The Peoria Marine and Fire Insurance Co v. Reuben S. Hall.

Insurance by one part owner. — If one partner insure the partnership property against loss by fire in his own name only, and it does not appear that the insurance was really intended for the benefit of the firm, the premium paid from the partnership funds, and the transaction subsequently ratified by the other partner, the policy will cover only the undivided interest of the partner insuring.

Digitized by Google

PEORIA MARINE AND FIRE INSURANCE CO. *v.* HALL.

It makes no difference in this respect that the agent of the insurer knew the interest of the parties, and that it was the intention of both the insurer and insured, at the time of issuing the policy, that the insurance should cover the whole.

The rule may be otherwise where the partner making the insurance has made advances to the firm, which, by agreement, are to constitute a lien on the goods insured.

Where a policy when made covers the interest of one partner only, the remaining interest can not be brought within it by the partner insured subsequently becoming the owner of the whole.

Conditions in fire policy: limitation of action.—By one of the conditions attached to a fire policy it was provided that no suit should be brought upon it unless within twelve months next after the loss; and in case any suit should be commenced after the expiration of twelve months, the lapse of time should be deemed and taken as conclusive evidence against the validity of the claim. It was held that if such a condition was valid at all, it was valid as a *contract only*, and that the limitation fixed by it must, upon the principles governing contracts, be more flexible in its nature than one fixed by statute, and liable to be defeated or extended by any act of the insurer which prevents action being brought within the prescribed period.

Held further, that the insured had the whole of the twelve months within which to commence suit, and that the limitation must rest upon the tacit condition, without which it could not be valid, that the insurer should be accessible to the service of process by which suit may be commenced against him, if not for the whole period, at least for a sufficient time immediately preceding its close to enable the insured to commence his suit in the ordinary legal mode.

And process having been issued before the expiration of the twelve months, returnable two days after their expiration, and no agent of the insurer—a foreign corporation—being found in the county, upon whom to make service, and new process being issued on the return of the first, it was held that the failure to commence suit within twelve months was sufficiently excused, and the second suit, under the circumstances, was brought in season.

Conditions in policy: keeping of gunpowder: waiver.—Where by a fire policy it was provided that the keeping of gunpowder "without written permission in the policy" should render the policy void, it was held that if the agent taking insurance on a stock of goods knew that gunpowder was kept and to be kept, the keeping it would not render the policy void, whether permission to keep it was indorsed or intended or neglected to be indorsed or not.

Notice of this fact to the agent was notice to the principal, and by taking the premium and issuing the policy, the insurer must be regarded as having waived the condition which prohibited gunpowder being kept.

Heard November 5th, 1863. *Decided January 8th.*

Error to Washtenaw Circuit, to which the case had been transferred from Jackson. All the material facts appear in the opinion.

Digitized by Google

Livermore & Wood, and *Johnson & Higby* for plaintiffs in error:

1. This suit was commenced by the last writ. There is nothing showing it to have any connection with the former writ, except the words "Alias Summons," indorsed on the seal of the writ; but we submit that does not make it a continuous writ.

As to the validity of the limitation of right of action by the insured. See 2 *Phil. on Ins.* § 2171; 1 *Blatch.* 280; 25 *Ill.* 446; 3 *Hill*, 161; 9 *Ind.* 448; 20 *Vt.* 230; 27 *Vt.* 101; 31 *Penn.* 449; 24 *Geo.* 101; 6 *Ohio*, 602; 6 *Gray*, 606, 180; *Broom's Legal Maxims*, 539.

2. The second question to be submitted in this case, is whether, if the agent, King, knew at the time of effecing the policy, that the property insured belonged to the plaintiff and Bennett, the policy would be valid for the whole stock insured.

The third question is, whether the court erred in charging that, if the plaintiff informed the agent that he kept gunpowder in his store for sale, and the agent intended to insure against keeping it but neglected to indorse the permission on the back of the policy, such neglect would not make the policy invalid.

We propose to discuss these questions under one head, as they involve substantially the same principle in law, viz: whether the written terms of the policies, and consequently the liabilities and obligations of the parties, can be changed by any parol agreement or understanding between the agent and insured.

The phraseology of this last charge is peculiar, and is really inapplicable to the evidence in the case; for the evidence is that the plaintiff informed the agent that he kept gunpowder for sale, and the agent denies it. Yet the Court charged the jury, that if the plaintiff informed

Digitized by Google

the agent that he kept gunpowder, &c., and the agent intended to insure against it, the policy is not invalid. There is no evidence the parties intended to make any other or different agreement than the one reduced to writing; but the jury have found that the parties did intend to make a different agreement, and the question is, which is to prevail, the written agreement or the agreement which the jury say the parties intended to make, founded upon the evidence of the conversation of the parties at the time this written agreement was executed and delivered.

We need not cite authorities to show that parol evidence is not admissible to vary, explain or contradict an agreement in writing; as, in the language of the books, "It is not admissible to give evidence of a parol agreement prior to, or contemporary with a written instrument, and which varies its terms:"—23 *N. Y.* 516.

So that if we have properly stated this question, the charge was certainly erroneous. For the express provision of the policies is, that the keeping of gunpowder for sale, or on storage, without the authority in writing, shall render them void.

But we think this charge is erroneous for another reason, viz: we think the conditions annexed to policies are limitations on the power of agents; and these limitations were known to the assured, and therefore he has no cause of complaint. He knew from both of these contracts in his possession, that they were forfeited by keeping gunpowder.

And he knew, or was bound to know, any parol agreement contrary to the terms of his policies was of no account.

There is this difference in the last two questions: In reference to the ownership of the property, it was represented in the application of the plaintiff as his property. It was insured as his property, and the facts contained in

Digitized by Google

the applications are declared to be warranties by the express terms of the policy; and such is the law, without these express stipulations, if referred to in the policy:— *Ang. on Ins.* §141, *and note* 2. And unless these facts are literally true, the policy is void.

O. Hawkins, for defendant in error, argued that the second summons was to be regarded as an alias. Also, that the stipulation contained in the policy limiting the time to one year after the loss, in which suits may be brought for losses sustained, is against public policy and void:—5 *Ind.* 23; 2 *Ind.* 102; 9 *Ind.* 448; 4 *Ind.* 239; 5 *McLean*, 461.

The stipulation is a mere attempt to bar a right of action before the right accrues. It is a release to operate upon the happening of an event yet to occur, and which may or may not take place; and to make a release good it must operate on an *existing claim, a present right.*

The time specified in the statute of limitations is as much a part of the policy of the law as the act itself, and it is a matter of law and can not be changed by the contract of the parties:—5 *McLean*, 465.

Another error alleged, is, that the Circuit Judge charged the jury, that if the agent, King, at the time of making the policy on the goods, knew the interest of the parties, that they were jointly owned by Hall & Bennett, and insured the whole stock, the policy would be valid for the whole stock insured. The Court was clearly right.

It was in proof that Hall stated to King he did not think he had the right to insure Bennett's share. King replied it would make no difference, that Hall had the right to insure for the whole amount.

It would be a fraud to permit them to take advantage of their own acts to defeat the plaintiff's recovery, and the law will not permit it. The insurance company having

Digitized by Google

received the premium, and adopted the acts of their agent, they must abide by them.

It makes no difference whether Hall's interest was much or little, only to show that Hall practiced no fraud by representing he was the owner of the goods when he was not. That his interest was sufficient to entitle him to recover will appear from the following cases:—*Ang. on Ins.* §§ 55, 79; 1 *Hall*, 84; 6 *Cush.* 7.

It was left to the jury to determine, from the evidence, whether the agent, King, intended to insure the whole stock against fire, and including gunpowder; and the jury found he did, though he omitted to make the indorsement on the policy.

The failure to indorse it on the policy was not the fault of the plaintiff, and the company can not take advantage of it: — 1 *Bosw.* 522.

CHRISTIANCY J:

This was a suit brought by Hall against the company, upon two policies of insurance against loss by fire; one upon a stock of goods in plaintiff's store in the village of Hamburg, Livingston county, Michigan, to the amount of two thousand dollars, dated January 13th, 1860; and the other for a like amount in the aggregate, upon plaintiff's dwelling house, furniture, clothing, barn and shed, hay and grain, and on his store (building) there situate, the amount insured upon each item being specified; that upon the store building being one hundred and fifty dollars. This policy is dated August 9th, 1859.

The policies on their face are declared to be "made and accepted in reference to the conditions thereto annexed, which are to be used and resorted to in order to explain the rights and obligations of the parties in all cases not therein otherwise specially provided for." By the eighth condition annexed, it is declared (among other things) that "the keeping of gunpowder or fireworks, for sale or on

Digitized by Google

storage, upon or in the premises hereby insured, or in any building containing property insured by or under this policy, without written permission in the policy, shall render it void and of no force or effect."

The 17th condition is in the following words: "It is further hereby expressly provided, that no suit or action against said company, for the recovery of any claim under or by virtue of this policy, shall be sustainable in any court of law or chancery, unless such suit or action shall be commenced within the term of twelve months next after any loss or damage shall occur: and in case any suit or action shall be commenced against said company after the expiration of twelve months next after such loss or damage shall have occurred, the lapse of time shall be taken and deemed as conclusive evidence against the validity of the claim so attempted to be enforced."

It was proved on the trial by the plaintiff below, who was sworn as a witness in his own behalf, and the fact was undisputed, that at the time of the application for insurance of the goods, and at the date of the policy (January 13th, 1860), one Helam Bennett was a partner of the plaintiff in business, and, as such, was the owner of the undivided half of the goods insured, and continued to be such partner and owner until the 14th day of March, 1860, when the plaintiff bought out his interest.

There was evidence tending to show (as to the policy on the goods) that King, the agent of the company, came to the store and wanted to insure the goods; that plaintiff signed the application for the policy, which was mostly blank when signed; that some one came in, and King turned around and said plaintiff could sign it, and he (King) could fill it out; that plaintiff told King he usually sold gunpowder and every thing usually sold in a country store, and that he intended to do so. And (in reference to the policy on the store) there was evidence that, at the time the insurance was taken, the keeping of

Digitized by Google

gunpowder was talked over with King, the agent, and he was told they had gunpowder in the store, and was asked if it would make any difference if powder was kept for sale; to which King replied "No."

There was also evidence that plaintiff, at the time of the application for the insurance on the goods, told the agent he did not think he (plaintiff) had a right to insure Bennett's share, and that King replied it would make no difference; that plaintiff had a right to insure the whole.

The fire occurred on the 31st day of March, 1860, by which the store building and the stock of goods were destroyed.

The Circuit Judge charged the jury that, "if the agent, King, at the time of making the policy on the goods, knew the interest of the parties — that they were jointly owned by the plaintiff and Bennett — and insured the whole stock, the policy would be valid for the whole stock insured." To this charge exception was taken, and this presents the first question we shall consider.

It is evident from the language of this charge, that it was intended to instruct the jury, that, if the agent, at the time of making the policy, knew the interest of the parties, &c., the policy would be valid for the whole amount of the interest of both partners, and that the plaintiff was entitled to recover in this action the whole amount of the loss of all the goods, though his interest at the time of the insurance was but one half, and though the insurance was in his name alone, and his declaration averred that, "at the time of making said policy, and from thence until the loss, &c., he was the owner of said property insured by said policy, and of the value, and to the amount, by the said defendant insured thereon."

Without attempting to decide what might have been the rule of law, had it appeared from the evidence that the insurance was really intended for the benefit of

Digitized by Google

the firm, the premium paid from the partnership fund, and the transaction subsequently ratified by the other partner; we think where (as in the present case) there is no evidence of this kind, and its whole tendency is the other way, the rule is well settled, in reference to a fire policy like this, that if one partner, or part owner of property held in common, insure in his own name only, the policy will cover his undivided interest, *and no more;* — *Graves v. Boston Marine Ins. Co.* 2 *Cranch*, 419, 440; 3 *Kent* (*5th ed*), 258; 2 *Duer's Ins.* §§ 24 *and* 20; *Finney v. Bedford Com. Ins. Co.* 8 *Metc.* 348; *Finney v. Warren Ins. Co.* 1 *Metc.* 16; *Pearson v. Lord*, 6 *Mass.* 81; 1 *Phil. on Ins.* 219, § 391; 1 *Arnould on Ins.* 146 *and note.* The rule may be otherwise when the partner making the insurance has made advances to the firm, which, by agreement, are to constitute a lien on the goods insured: — 2 *Duer on Ins.* § § 19 *and* 24; *Milliandore v. Atlantic Ins. Co.* 8 *La.* 557.

We do not see how the agent's knowledge of the interest of the parties, nor his belief or assurance that Hall had the right to insure the whole, can affect the question, so long as the insurance was not in fact made on the account, and for the benefit, of the firm. One partner can not, by reason alone of his interest as such, insure in his own name, and for his own benefit, the interest of his co-partner in the partnership stock. And, though such may have been the intention both of the assured and of the company, on entering into the contract, the policy, in legal effect, can operate only as an indemnity against loss to the extent of the plaintiff's undivided half of the goods. And, if the policy, when made, did not cover the other partner's undivided half, that portion would not be brought within it by the plaintiff's subsequent acquisition of the property from such other partner. The charge was therefore erroneous, and as the verdict of the jury, in accordance with the charge, was for the whole amount of the goods, the judgment must be reversed upon

Digitized by Google

this ground. But, as there is to be a new trial, we think it proper to indicate our opinion upon the two other questions raised in the case.

It was objected by the defendant below, that the action was not brought within the period of twelve months after the loss, according to the seventeenth condition attached to the policy. It appears from the bill of exceptions that a summons was issued in the cause March 18th, 1861 (thirteen days before the expiration of the twelve months), returnable on the second day of April, 1861; that, on the third day of April, 1861, the sheriff made a return upon the said summons that defendant could not be found in his bailiwick, that on the next day another summons was issued with which defendant was served, nothing appearing on this summons showing it to be a continuation of the first, except the word "*alias*" written by the clerk upon the face of the seal.

We do not deem it necessary to discuss the question whether this second summons, as an "*alias*," operated strictly as a continuation of the first, so as to save a right of action against a statute of limitations which had run upon it in the mean time; nor do we think it necessary to determine the validity of this species of limitation by contract. If valid at all, it was valid *as a contract*, and *not* as a *statute*. A limitation fixed by statute is arbitrary and peremptory, admitting of no excuse for delay beyond the period fixed, unless such excuse be recognized by the statute itself. But a limitation by contract (if valid) must, upon the principles governing contracts, be more flexible in its nature, and liable to be defeated or extended by any act of the defendant which has prevented the plaintiff from bringing his action within the prescribed period. The plaintiff had the whole of the twelve months in which to bring his suit; and it was as competent for him to institute it on the last as the first, or any intervening day. And the fundamental idea, the tacit condition upon which

Digitized by Google

such a limitation must rest, and without which it could not be tolerated for a moment, is, that the defendant should be accessible to the service of process by which suit may be commenced against him, if not for the whole period, at least for a sufficient time immediately preceding its close, to enable the plaintiff to commence his suit against him, by the service of process in the ordinary legal mode: otherwise the defendant would be enabled to take advantage of his own wrong, and, by absenting himself, entirely to defeat the plaintiff's right of action.

The defendant in the present case was a foreign corporation, doing insurance business in this State. By the act of February 15, 1859, full provision was made for bringing the action within the State: and the company, before doing any business in the State, were required to file in the office of the Secretary of State a resolution consenting that service of process may be made upon any agent of the company. Nothing is said in the case upon what agent the service of the second summons was made: but it must have been made upon some agent of the company. It does not appear whether there was an agent in the county of Jackson, or in any other particular county. It appears that S. S. Brown was the general agent of the company for this State, and that Knight was also an agent, but neither their residence nor place of business is stated. From any thing which appears in the case, the plaintiff was as much at liberty to bring his action in Jackson as in any other county, so far as the residence of an agent could have any bearing, if, indeed, it could have any under the law: and if an agent of the company resided in Jackson county, the action was certainly very properly brought there.

All that was necessary for the plaintiff to do to excuse the delay beyond the twelve months, was, to take the proper and usual means for instituting his suit, and getting service of process within the limited period: which

Digitized by Google

he did by issuing a summons thirteen days before the expiration of that period, returnable two days after it expired. The return shows that no service could be had during that time. We can see no possible ground for imputing any want of good faith to the plaintiff in his endeavor to get the process served in time. Upon the facts stated in the case, therefore, it appears to have been the fault of the defendant—the absence of an agent—that the first summons was not served, and the action com menced within the twelve months: and this is sufficient to defeat the limitation, or extend it till the service was made under the second summons, which was issued immediately on the return of the first.

As to the condition in reference to the keeping of gunpowder, there was evidence from which the jury were authorized to find, that the agent knew it was kept a the time, and was to be kept after the insurance, and that he assented to it, and induced the plaintiff to believe that it would make no difference.

Upon this point the Court charged, that, "if plaintiff informed the agent that he kept gunpowder in his store for sale, and the agent intended to insure against keeping it, but neglected to indorse the permission on the back of the policy, such neglect would not make the policy invalid." The condition did not provide for any *indorsement* of this kind upon the policy, but the keeping of gunpowder was to render the policy void "without written permission in the policy." To this extent the charge was inaccurate, yet we do not think it can be treated as error of which the company can complain: since, we think the plaintiff was entitled to a still stronger charge in his favor. He would have been entitled to a charge that, if the agent knew it was kept, and to be kept, the keeping it would not render the policy void, whether the permission was indorsed or intended or neglected to be indorsed or not.

Digitized by Google

But the counsel for the plaintiff in error insists that the printed condition was notice to the assured of the agent's want of authority to assent to the keeping of gunpowder, &c., and that this assent could be given only by the company itself. This, at first view, would seem plausible, and might be sound, but for another principle which lies back of it and defeats its application. The principle to which we allude is, that notice to the agent is notice to his principal. The company must be regarded as knowing what he knew. If he knew that powder was kept at the time of the insurance, or to be kept during its continuance, the company must be regarded as having known it also. They had power to waive the condition; and by taking the premium and issuing the policy with such notice or knowledge, they must be regarded as having waived the condition which prohibited its keeping. It would be a gross fraud in the company to receive the premium for issuing a policy on which they did not intend to be liable, and which they intended to treat as void in case of loss:—*Bidwell v. North Western Ins. Co.* 24 *N. Y.* 302; *Frost v. Saratoga Mutual Ins. Co.* 5 *Denio*, 154; *Masters v. Madison Co. Mutual Ins. Co.* 11 *Barb.* 624; *Campbell v. Merchant's & Farmers' Mut. Ins. Co.* 37 *N. H.* 35; *Marshall v. Columbian Ins. Co.* 27 *N. H.* 157; *Hartford Prot. Ins. Co. v. Harmer*, 2 *Ohio* (*N. S.*) 452; *Howard Fire Ins. Co. v. Bruner*, 23 *Penn.* 50; *Clark v. Union Mut. Fire Ins. Co.* 40 *N. H.* 333: *see Angell on Ins.* § 470.

We see no error in the record or proceedings in the Court below, except that in reference to the interest of the plaintiff at the time of the insurance. For this error the judgment must be reversed, with costs in this Court, and a new trial granted.

The other Justices concurred.

Digitized by Google

Benjamin Thorne v. Augustus Hilliker and others.

Practice in foreclosure suits: Disregarding commissioner's report. — Bill for the foreclosure of a mortgage. An answer being filed denying that any thing was due, the case was referred to a circuit court commissioner, whose report showed nothing due when suit was commenced. This report was not excepted to, and it was held that the defendant had a right to rely upon it, and that the Court could not inspect the documents which were before the commissioner, or take evidence to test the correctness of the commissioner's conclusions. And the Court below, having, on inspection of the documents, rendered a decree for complainant, it was reversed by this Court.

Submitted July 17th, 1863. *Decided January 8th.*

Appeal in chancery from Lapeer Circuit. The bill was filed for the foreclosure of a mortgage. Birdsall, one of the defendants, answered, denying that there was any thing due on the mortgage when the suit was commenced. The bill was taken as confessed by the other defendants. The case being referred to a circuit court commissioner to report the amount due, he made a report showing that the interest due at the time suit was commenced had all been paid, and by the terms of the mortgage no part of the principal was yet due. No exception was taken to this report, but, on the hearing in the Circuit Court, the Circuit Judge, on an inspection of the receipts upon the mortgage came to the conclusion that one year's interest was due and unpaid at the time the bill was filed; and rendered decree for complainant. Birdsall appealed to this Court.

The original mortgage was brought to this Court for inspection — the controversy being as to the *time* stated in one of the receipts, up to which interest had been paid — one party insisting that it was to December 5, 1858, and the other to December 5, 1859.

A. B. Maynard, for complainant.

Hemingway & Stickney, for Birdsall.

Digitized by Google

THORNE v. HILLIKER.

CAMPBELL J.:

In this case the commissioner's report, stating the amount due on a mortgage, shows that the principal was not due until after the bill was filed, and that no interest was then unpaid, the interest accruing up to that time being stated to have been paid. Complainant did not except to this report, nor did he object to it; but allowed it to stand as the foundation of his claim to a decree. He can not now, by evidence, or by asking this Court to inspect the documents, rid himself of the effect of this action. He is bound by the report which he has adopted, and the defendant has a right to rely upon it.

There was therefore no cause of action when the bill was filed. The decree must be reversed, and the bill be dismissed, with costs of both courts as far as the appellant is concerned.

The other Justices concurred.

Hiram R. Johnson v. The Provincial Insurance Company of Toronto.

Former recovery as a bar: fraudulent concealment of cause of action.—An insurance agent gave bond to his principal, conditioned to account for and pay over the moneys received by him as such. Judgment having been recovered by them on this bond for money not accounted for and paid over, a scire facias was issued, assigning as a further breach, that the obligor had, before the judgment, received a further sum for which he failed to account, and the receipt of which he fraudulently concealed. On demurrer, it was held that the fraudulent concealment was a sufficient reason for not including this sum in the original pleadings and judgment; — and the demurrer was overruled.

Mistake in assignment of error: amendment.— An objection to a writ that it is not *tested* "in the name of the People of the State of Michigan," is not sufficient to allow the party to make the point that the *style* of the writ is not "in the name of the *People*," &c. And as the objection is purely technical, an amendment should not be allowed to rectify it to the overthrow of substantial justice.

Heard October 30th, 1863. Decided January 8th.

Digitized by Google

JOHNSON v. PROVINCIAL INSURANCE CO. OF TORONTO.

Error to Wayne Circuit.

On July 22, 1858, the defendants in error filed their declaration in said Court, against Roderick M. Chittendon, Hiram R. Johnson and Hiram R. Andrews, upon a bond given by them, conditioned that said Chittendon should, from time to time, account for and pay or cause to be paid to said insurance company, all such moneys as should be by him received for said company, and well and faithfully execute and perform his duties as agent of said company. Breach, that said Chittendon failed to account for and pay over the sum of $555.36 by him received for the company.

September 14th, 1858, the company recovered judgment in said suit by default, for $2000, the penalty of the bond, and had their damages assessed at $565.61.

November 29, 1859, scire facias was issued upon said judgment as follows:

The People of the State of Michigan, to the Sheriff of the County of Wayne, Greeting:

[SEAL.] Whereas the Provincial Insurance Company of Toronto, of the Province of Canada, heretofore, to wit: on the fourteenth day of September, 1858, in the Circuit Court for the County of Wayne, and State of Michigan, recovered against Roderick M. Chittendon, Hiram R. Johnson, and Hiram R. Andrews, judgment for a certain debt of two thousand dollars; and whereas the said Court also awarded execution against the said Roderick M. Chittendon, Hiram R. Johnson and Hiram R. Andrews, for the sum of five hundred and sixty-five dollars and sixty-one cents, ascertained and determined by said Court to be the amount due the said plaintiff, by reason of the breach of a certain writing obligatory, hereinafter mentioned, being part of said debt for which said judgment was rendered, and also their costs and charges expended in that behalf by said plaintiffs, whereof the said Roderick M. Chittendon, Hiram R. Johnson, and Hiram R. Andrews were convicted,

Digitized by Google

as by the record and proceedings thereof remaining in said Circuit Court, before the Judge thereof, at the city of Detroit in said county of Wayne, manifestly appears.

And afterwards, at this day, to wit: the twenty-ninth day of November, 1859, the said Provincial Insurance Company of Toronto, by William A. Moore, their attorney, come into the said Circuit Court for the County of Wayne, and before the Judges thereof at the said city of Detroit, and in accordance with the form of the statute in such case made and provided, give the said Court to understand and be informed that the said debt so by their account as aforesaid was and is a certain penal sum of two thousand dollars, mentioned in a certain bond or writing obligatory, bearing date and executed by the said defendants, and sealed with their seals, on the second day of September, 1857, at the said city of Detroit, and within the jurisdiction of this Court, and to the Court now here shown, and being upon the files thereof, which said writing obligatory was and is subject to a certain condition thereunder written, whereby after reciting to the effect following, to wit: Whereas the said defendant, R. M. Chittendon, had been retained and employed by the said plaintiffs as an agent in the transaction of fire and marine insurance business, for and on account of said plaintiffs, and upon being so employed had agreed to enter into a bond in a sufficient penalty, for insuring to the said plaintiffs the faithful discharge of his duties in his said employment, and whereas for the engagement of the said Roderick M. Chittendon as such agent, they, the said Hiram R. Johnson and Hiram R. Andrews, on the behalf and at the request of the said Roderick M. Chittendon, did consent and agree to become surety unto the said plaintiffs, for the said agent's true and faithful execution and discharge of his said office, as thereinafter mentioned, to wit: that if the said Roderick M. Chittendon should, from time to time, and as often as he should be thereunto requested

Digitized by Google

by the said plaintiffs, their successors and assigns, well and truly account for, and pay or cause to be paid unto the said plaintiffs, their successors and assigns, all such sum or sums of money as should be by him, the said Roderick M. Chittendon, had and received for, on account of, or to the use of said plaintiffs, in any way whatever, and should at all times, when thereunto requested, well and truly account for and deliver unto the said plaintiffs, or unto such person or persons as the said plaintiffs should appoint to receive the same, all such sum or sums of money, books, papers, writings, receipts, vouchers, matters and things which he, the said Roderick M. Chittendon, had received, or should from time to time be intrusted with, or which should come into his hands for, on account of, or to the use of the said plaintiffs and their successors; also, if the said R. M. Chittendon should from time to time, whilst he should so continue an agent of the said plaintiffs, in all things and in all respects well and faithfully execute and perform the said office of agent according to the instructions which might from time to time be furnished him from the said plaintiffs, or when he should act without instructions, then said obligation should be void, otherwise to be and remain in full force and virtue.

And the said plaintiffs, the Provincial Insurance Company of Toronto, also give the said Circuit Court for the county of Wayne here to understand and be informed, that the declaration by them filed in the said action, on which they obtained said judgment aforesaid, was exhibited on the 22d day of July, 1858, and that said action was brought and commenced upon and for a certain breach of the aforesaid writing obligatory, by the said defendants, before the exhibition of the declaration aforesaid.

But the said plaintiffs, for further and other breach of the said writing obligatory, according to the form of the statute in such case made and provided, give the said Court to understand and be informed, that after the exe-

Digitized by Google

cution of the said writing obligatory, and before, and at the time of the filing of the said declaration in the aforesaid action, the said Roderick M. Chittendon had received, as agent of and for, and on account of the said plaintiffs, a large sum of money, to wit: the further sum of three hundred and two dollars and sixty cents, and that said Chittendon, although thereunto afterwards often requested, to wit: on the 29th day of October, 1859, by the said plaintiffs, has failed and neglected to well and truly account for and pay, or cause to be paid, the said last mentioned sum of money to said plaintiffs, or any part thereof, according to the condition of said writing obligatory, and still neglects and refuses so to do, to wit: at the city of Detroit aforesaid: that the said plaintiffs, at the time of the entry of the judgment so recovered as aforesaid, had no knowledge that the said defendant Chittendon had received the said sum of money last mentioned, or any part thereof: that the said defendant Chittendon denied that he had received any such sum of money, or any part thereof, and they charge that he wrongfully concealed from said plaintiffs that he had received said sum of money, or any part thereof, which said last mentioned breach of the said writing obligatory so assigned, the said plaintiffs give the said Court here to understand and be informed, is a further and other breach than the one for and by reason of which the said plaintiffs obtained the said judgment so by them recovered as aforesaid: and for which said further and other breach the said plaintiffs have humbly besought this Court to provide them a remedy, and this Court being willing that what is just in this behalf should be done, does, according to the form of the statute in such case made and provided, command you that you summon the said Roderick M. Chittendon and Hiram R. Johnson (the said Hiram R. Andrews being now deceased) that they be and appear before this Court, at the court house in the city of Detroit, in said county of Wayne, on

Digitized by Google

Tuesday the third day of January next, to show cause, if any they have, why execution should not be had and awarded against them, the said Chittendon and Johnson, upon the said judgment so obtained for the damages aforesaid, by reason of the said further and other breach of the said condition of the said writing obligatory, and further to do and receive what said Court, before the Judge thereof, shall then and there consider of them in this behalf: and have you then and there this writ.

Witness the Honorable Benjamin F. H. Witherell, Judge of the Circuit Court for the county of Wayne, at Detroit, on the 29th day of November in the year one thousand eight hundred and fifty-nine.

E. T. Throop, Clerk.

Wm. A. Moore, Piffs. Atty.

To this the defendant Johnson demurred, for the following reasons:

1st. For that the said writ is not tested "in the name of the People of the State of Michigan."

2nd. For that it appears that the breach alleged in the said writ of *scire facias* is for the same or a part of the same breach for which a recovery was had in the action upon which said writ issued.

3rd. For that said *scire facias* is not issued against Hiram R. Andrews, the defendant in the judgment recovered in said cause, or against his legal representatives in any way, nor are they or either of them parties thereto.

4th. And for that the said writ is in other respects deficient and insufficient.

The Circuit Court overruled the demurrer, and gave judgment for the plaintiffs.

D. C. Holbrook, for plaintiffs in error:

The defect in the style of the writ not being issued "In the name of the People of the State of Michigan," rendered the writ void and not amendable:—20 *Ill.* 509,

Digitized by Google

The second error is, that the writ sets forth the fact that this breach accrued prior to the commencement of suit, and it is for exactly the same breach (not for the same money) as that alleged in the declaration.

The plaintiffs took judgment in the former suit at their peril for any sum. The defendant could have been sworn for plaintiffs, and he might have sworn to the truth, and owned up as to the whole money. But suppose he had sworn that he had not received any other, and the plaintiff knew nothing of further receipts, as is alleged; would it then be competent, after a discovery of the facts, to recover it in the manner now attempted?

A bill of discovery might have been filed, and the fact of the receipt of this money found out.

Had this *sci. fa.* alleged, as a breach, that the defendant Chittendon did not follow iustructions, and thereby the money was lost, or any other breach but that identical with the declaration, another question might arise.

Chittendon's denial out of court was nothing more than his plea of general issue in court.

It is not necessary to cite authorities showing that a plaintiff can not split the same cause of action, and recover parts by two suits; that a party shall not be subject to two suits for the same breach; but the ignorance of the plaintiff is relied upon as good cause for multiplying suits against these sureties, as often as a discovery is made of other monies collected.

This is contrary to the well established course of decisions:—2 *Smith's Lead. Cas.* 4 *Am. Ed.* 572-3, *&c.*

W. A. Moore, for defendants in error.

CAMPBELL J.:

The judgment below was rendered on a *scire facias* to recover upon further breaches of a bond which had passed into judgment against Roderick M. Chittendon, as

Digitized by Google

principal, and Hiram R. Johnson and Hiram R. Andrews, as sureties. The bond was given for the purpose of securing the insurance company against the misconduct of their agent. Judgment was given on demurrer.

It was alleged as error, that the breach set forth in the scire facias is the same or a part of the same set forth in the original declaration. The scire facias avers that the money now claimed was received by Chittendon before the original suit, but that he concealed that fact from the company, and that they knew nothing of it when the judgment was rendered.

The bond was given to secure an *accounting*, as well as payment; and this was necessary, for the obvious reason, that generally an insurance company has no means of discovering the receipt of money until the agent informs his principal of the fact. An agent can not be permitted to set up his own wrong to avoid a liability; and if he kept the company in ignorance of his receipts, he can not, on that ground, object that they have not acted as if they knew what they did not know. Our statute makes a fraudulent concealment of a cause of action a ground for excepting it from the Statute of Limitations (*Comp. L.* § 5372); — and if it avails for such a purpose, it must equally avail in a case like the present. The scire facias avers that it is a new breach, and gives the fraudulent concealment as a sufficient reason for not including it in the original pleadings and judgment.

It is also objected, that the scire facias is not tested in the name of the People of the State of Michigan. It does run in the name of the People of the State of Michigan, and conforms in this regard to the English practice, and that of the United States Courts, and probably most of the State Courts. A writ is properly said to run in the name of the person or government from whom the command on the face of the writ appears to emanate.

Had not the words "in the name of the People of

Digitized by Google

the State of Michigan" been inserted in the Constitution between inverted commas, so as to favor the idea that the phrase must be used *verbatim*, no difficulty could arise in this case about it. Whether the Constitution can be satisfied by a substantial compliance has been left unnecessary for decision in the case before us, as the objection, which is purely technical, is itself insufficiently taken. The Constitution does not require writs to be *tested* in the name of the People. The statute requires them to be tested in the name of the Circuit Judge. It is the *style* of the writ which must be in the name of the People. *Comp. L.* § 4107. As the statute is express upon this subject, the defendant in error was justified in assuming that the objection, being pointed at the *test* of the writ, was not well taken. We are reluctant to allow a party to lose a ground of error which we can see he probably designed to take, merely because of a slip in missapplying a technical phrase, but the objection itself is so technical that we should not feel justified in allowing such an amendment as would rectify the slip to the overthrow of substantial justice.

The other grounds of error were not pressed.

Judgment must be affirmed, with costs.

The other Justices concurred.

Lewis Bresler v. Henry Pendell.

Statute of Frauds: promise to pay the debt of another.— Where A had taken a contract to do work for B, but, not being paid, had abandoned the contract, and afterwards resumed it, and did certain extra work on the promise of C to pay him; but the evidence showed that he still looked to B for his pay, and not to C except as guarantor, it was held, that the promise of C, not being in writing, was void under the Statute of Frauds, both as to the extra work, and that done under the contract.

Heard October 24th, 1863. *Decided January 8th.*

Digitized by Google

BRESLER v. PENDELL.

Error to Wayne Circuit.

The cause, in the Court below, was referred to a referee, who reported the following facts:

"That in the month of May or June, 1860, one Charles E. Bresler made a contract with Eugene St. Amour, for the erection by the said St. Amour, for said Bresler, of a block of buildings on Michigan Avenue, in the city of Detroit. That according to said contract, said block of buildings was to be two stories in height, with walls of eight inches in thickness, and that the pillars of said block and the lintels were to be of wood. That after said contract was so made, St. Amour sub-let to the plaintiff in this cause, the job of doing the stone, mason and brick work of said block. That after said sub-letting, the plan of said block was twice changed, the first change being intended to make said block three stories in height instead of two, and substituting iron pillars and lintels instead of wood, and increasing the thickness of some of the walls to said block; and the second change being the same as the first, with the addition of a fourth story to said block. That said plaintiff entered into the prosecution of said work, under his agreement with said St. Amour, and prosecuted the same to completion. That during the progress of said work, said defendant was about said block much of the time, overseeing its construction, and giving directions as to the same. That said St. Amour failed to comply with his agreement with said plaintiff, in that he did not make the payments for said services, in accordance with his contract with said plaintiff, and that, in consequence thereof, said plaintiff twice abandoned said job, and refused to proceed further with the same. That on both of said occasions, said defendant requested said plaintiff not to abandon said job, and promised him that if he would continue the same to completion, he, the said defendant, would pay him, or would see him paid, and that

Digitized by Google

under said promise, said plaintiff resumed said job after so twice abandoning it, and completed the same; but that said promise, so made by said defendant, was not in writing, and that the said original contract, between said St. Amour and plaintiff, was still in existence and uncancelled.

That in consequence of the above mentioned changes made in said block, the following extra work became necessary, to wit: Setting in columns and fronts, and window caps and sills. That at the request and by the direction of said defendant, the following other extra work was done on said job, to wit: Rubbing down the front of said building preparatory to its being painted, and making two arches of brick work. That none of said extra work was included or mentioned in the said agreement, between the plaintiff and said St. Amour; that the same was done by said plaintiff, at the request of said defendant, and that said defendant promised and agreed to pay said plaintiff therefor; that the fair value of said extra work was the sum of three hundred and fifty-five dollars.

And I further certify and report, that I find as conclusions of law based upon the facts as above found in said cause,

First. — That said defendant is not legally liable to pay said plaintiff, for any portion of the work done by him, which was included and mentioned in the contract between St. Amour and said plaintiff, notwithstanding said defendant promised to so do, for the reason that said St. Amour's agreement with said plaintiff was still in force and uncancelled, and defendant's said promise to make such payments to plaintiff was by parol merely, and not in writing;

Second. — That the said defendant is legally liable to pay to the said plaintiff, the value of said extra work above mentioned, and not included in the St. Amour contract with the plaintiff, with interest thereon."

Digitized by Google

The referree reported to the Circuit Court all the evidence, and that Court rendered judgment against Bresler in accordance with his views. The view taken by this Court of the evidence sufficiently appears by the opinion.

D. C. Holbrook, for plaintiff in error.

Gray & O'Flynn, for defendant in error.

MANNING J.:

There does not seem to me to be any good reason for discriminating between the extra and the other work. If either was done on the promise of Bresler, it was not on his sole promise, but on his promise in connection with the previous promise of St. Amour, and therefore, if supported by a consideration, should have been in writing to bind Bresler. If, as some of the witnesses state, Pendell refused to go on with the work under his contract with St. Amour, because he was not paid by him, and on that account abandoned the work, and afterwards resumed it on the promise of Bresler, the evidence shows he still looked to St. Amour for his pay, and not to Bresler, except as surety or guarantor. I think the judgment should be reversed, and judgment be entered for Bresler, with costs of both courts.

The other Justices concurred.

Rufus Hunter, Executor, &c., v. Greenleaf Hopkins.

Parol evidence to divest a title to land.—To warrant a court of equity in divesting a title to land, on parol evidence that an unrecorded deed given therefor was subsequently, by agreement between the parties, surrendered by the grantee to be cancelled, the preponderance of evidence should be clear, and the evidence should be so convincing as to leave no reasonable doubt upon the mind.

Heard October 7th and 8th, 1863. *Decided January 8th*

Digitized by Google

HUNTER v. HOPKINS.

Appeal in chancery from Oakland Circuit.

Hunter, as executor of the last will and testament of Chipman Hopkins, filed his bill against Greenleaf Hopkins, setting forth in substance; That Chipman Hopkins, in October, 1848, was seized of certain lands, which he on that day conveyed to his son Greenleaf Hopkins, the defendant, and took back a life lease. That on the 10th September, 1854, Greenleaf, having failed to pay for said lands, was desirous to rescind his contract, and that it was agreed that the same should be done. That Chipman Hopkins settled with Greenleaf for what he had paid on the land, which sum was about forty dollars, and the same was paid back in a horse.

It is further charged that the deed was not recorded, and therefore it was handed back by Greenleaf, and the name was taken off or obliterated, and the deed was taken by Chipman and put among his papers, and remained there till March or April, 1856. That after that time it was taken without consent, and on 2d May, 1856, was recorded in the register's office of Oakland county, and that Greenleaf claims the land.

In his answer, Greenleaf admits the conveyance of said lands to him, but says the consideration was a mortgage of two hundred dollars on the land, and a mortgage on a horse of one hundred dollars, and the life lease. He avers that the deed was duly executed and acknowledged, and before he got it recorded some person unknown got possession of it, and tore off the name of Chipman. That after it was so mutilated he caused it to be recorded. He asserts that he paid Chipman the amount due on the mortgages, and they were given up to him.

That he never, at any time, proposed to rescind said trade, and that Chipman never let him have a horse to apply on a contract. That Chipman did let him have a

Digitized by Google

horse to sell, and that he sold him as agent for Chipman, and paid over the proceeds.

A large amount of oral testimony was taken in the case, and the Circuit Court entered decree for the complainant, as prayed.

G. V. N. Lothrop, for complainant.

Baldwin & Draper, for defendant.

CHRISTIANCY J.:

Upon a careful examination of the evidence in this cause, we do not think it satisfactorily sustains the case made by the bill. There is no direct or satisfactory evidence that the deed from Chipman Hopkins to his son (the defendant) was ever given up by the latter to the former, or that it was ever cancelled by the defendant's consent.

As to the horse alleged in the bill to have been given by Chipman Hopkins to the defendant, as a consideration for relinquishing to the father his title to the farm, we think there is a preponderance of evidence that it was sold by defendant as the agent of his father, and that the latter received the proceeds.

The evidence upon the point whether the farm had been given up to the father, and the trade abandoned, is very conflicting, and too inconclusive, in our opinion, to furnish a safe ground for divesting the record title to real estate. To divest such title on the grounds mentioned in the bill, upon parol evidence alone, the preponderance of evidence should be clear, and the evidence should be so convincing as to leave no reasonable doubt upon the mind.

The decree of the Circuit Court for the county of Oakland in Chancery must be reversed, and the bill dismissed, with costs to the defendant in both courts.

MARTIN CH. J. and CAMPBELL J. concurred.

MANNING J. did not sit in this case.

Digitized by Google

Henry Bower v. Reuben Town and another.

Dissolution of attachment: plea in abatement.—The only mode by which a defendant in attachment can contest the truth of the facts stated in the affidavit upon which the attachment was issued, is by an application to the circuit court commissioner for a dissolution of the attachment, under the act of April 7, 1851, Comp. L. §§ 4773 to 4776.

Where, therefore, an attachment was issued on an affidavit which alleged that defendant had disposed of his property with intent to defraud his creditors, and the defendant interposed a plea in abatement that he had not disposed of his property with intent to defraud his creditors, it was held that the plea was properly stricken from the files.

Heard November 3d, 1863. Decided January 8th.

Error to Washtenaw Circuit.

This suit was commenced by attachment by the defendants in error, against Henry Bower, the plaintiff in error. Declaration in assumpsit on promisory notes, with the common counts annexed, was filed, and to this declaration a plea in abatement was interposed. The writ of attachment was issued on the affidavit of one of the plaintiffs, stating, after alleging the indebtedness of the defendant, that the affiant had "good reason to believe that the said Henry Bower has assigned and disposed of his property with intent to defraud his creditors." The plea in abatement alleges that defendant had not assigned and disposed of his property with intent to defraud his creditors, at the time said affidavit was made, nor since; and that the affiant had not then, or before, or since, good reason to believe that the defendant had assigned and disposed of his property with intent to defraud his creditors, and prays judgment, &c. This plea, duly verified by the affidavit of the defendant, was, on motion of plaintiff's attorney, stricken from the files of the Court, as frivolous. Judgment was subsequently entered for plaintiffs, for want of plea.

A. Felch and *O. Hawkins* for plaintiff in error:

Digitized by Google

BOWER v. TOWN.

1. The statute treats the writ of attachment as an extraordinary process for the commencement of a suit. It is given only in special cases. The plaintiff has a right to it only when the special circumstances exist which are enumerated in the statute.

A plea in abatement is the proper method in all cases to try the question whether the plaintiff is rightfully in court. If he is not, the defendant has no occasion to answer to the merits of his claim, and may abate the suit.

2. The fact that enough is stated in the affidavit to entitle the plaintiff, *prima facie*, to the writ, does not preclude subsequent inquiry into the truth of the statement.

It may be well that the ministerial officer issuing the writ shall not be authorized to look beyond the face of the affidavit, but no court can be compelled to retain a cause in court which comes there only by a grace given to perjury.

The Court will look behind the affidavit, and if the cause alleged in it be found untrue, will abate the suit.

3. The truth of the fact, alleged in his affidavit by the plaintiff for obtaining the attachment, is allowed to be contested by the courts in most, if not all the States of the Union.

The manner of presenting the question is not uniform, but the right in some method to go behind the affidavit is uniformly admitted when not prohibited by statute.

Thus, in New York an attachment improvidently issued was disposed of by *supersedeas* from the Supreme Court, on showing the falsity of the affidavit on which it was obtained:—3 *Caines*, 257; 1 *Wend.* 66; 3 *Wend.* 424. It is now done under the code in that State by special motion, although the code gives no special authority for that proceeding:—7 *Barb.* 656; 12 *Barb.* 265.

In Pennsylvania it is heard on motion, and the alleged facts are controverted by affidavits:—1 *Dall.* 165; 2 *Yeates*,

Digitized by Google

277. So in New Jersey:—1 *Green*, 250; 1 *Green*, 131; 3 *Harr.* 287. So in Maryland:—3 *H. & McH.* 535. So in South Carolina:—2 *Nott & McC.* 130; *Ibid.* 323; 1 *McCord*, 331.

4. The plea in abatement is a proper method of presenting the objection to the action. So held in South Carolina:—1 *McCord*, 331; 2 *Nott & McC.* 130. In Tennessee:—3 *Sneed*, 536; 7 *Hump.* 465; 3 *Yerg.* 414; 1 *Humph.* 420; 4 *Humph.* 346. In Kentucky:—*Hardin*, 65 *and n.*; 6 *Dana*, 289; *Ibid.* 321. In Indiana:—6 *Blackf.* 232; 7 *Ibid.* 573. In Illinois:—1 *Ill. Appx.* 25; 10 *Ill.* 31. In Virginia:—2 *H. & M.* 312. In Ohio:—1 *Ohio Cond.* 244. In Missouri:—17 *Mis.* 32; 5 *Mis.* 544; 21 *Mis.* 296. In Alabama:—3 *Stew.* 226.

These cases were decided in States where no statutory provision interfered to give or prohibit any such authority for the adjudication:—*Drake on Attachments*, § 406.

5. This question is not affected by the statute (*Comp. Laws*, § 4773 *et seq.*) giving the right to move for a dissolution of the attachment, before a Judge at chambers or the circuit court commissioner.

That statute is designed as a speedy and summary remedy out of court, for the release of property attached. It does not necessarily affect the action, but only releases the property, leaving the party and the suit still in court. It is a relief to the defendant—summary and speedy—but partial and imperfect. That which is sought by the plea in abatement is in the ordinary course of legal proceedings, before the regular judicial tribunal, where decisions are of record and subject to review by the Supreme Court.

Maynard & Meddaugh for defendants in error.

CHRISTIANCY J.:

The motion to strike from the files the plea in abatement was properly granted. The proceeding by attachment

Digitized by Google

under our statute is two-fold, *in rem*, and *in personam*. The writ is a summons as well as an attachment. When there is no personal service upon the defendant, and he does not appear in the suit, the proceeding is strictly *in rem*, and no property except that attached can be taken in execution. When the defendant has been personally served, or has appeared, the proceedings in the suit are to be the same in all respects as upon the return of a summons personally served in a suit commenced by summons: — *Comp. L.* § 4758; and the execution may be levied upon the property of the defendant generally, as in other cases.

Chapter 114 of the Revised Statutes of 1846, and the amendatory act of April 7, 1851 — *Comp. L.* §§ 4773 *to* 4776—must be construed together. And, since the passage of the latter (whatever might have been the case before), the dissolution of the attachment on the ground set up in the plea, and the delivery of the property to the defendant, does not affect the plaintiff's right to proceed with the suit in the same manner as if commenced by summons, if the defendant has appeared in the suit or enters his appearance under the order of the Judge or commissioner hearing the application for dissolution.

And the only mode in which the defendant can avail himself of the matter set up in the plea in this case, is, by an application for a dissolution of the attachment in the manner provided by this amendatory act.

The judgment of the Court below must therefore be affirmed, with costs.

The other Justices concurred.

Digitized by Google

The People, on the relation of Calvin P. Austin v. Peter Fralick, Sheriff of Wayne County.

Redemption by judgment creditors from execution sales.—Judgment creditors who were entitled, under §3147 of Compiled Laws, to acquire the rights of a purchaser of premises sold on execution, applied to the purchaser for that purpose, and took from him an assignment of his certificate of sale, but without having presented him with the statutory proofs of their title to acquire such rights. Held, that where the application was thus made to the purchaser himself, and evidences produced which were satisfactory to him, it was sufficient; though if the application had been made to the register of deeds or sheriff, the statutory proofs must have been produced.

Held further, that the creditors, by thus taking an assignment of the certificate of sale, did not debar themselves from holding as judgment creditors under the statute; and that a subsequent creditor applying to become purchaser of the premises under the statute must pay their judgment as well as the original bid.

Heard October 15th, 1868. *Decided January 8th.*

Error to Wayne Circuit.

D. C. Holbrook, for plaintiff in error:

Buhl purchased of Corning the certificate of sale, and thereby became Corning's *assignee, with no other rights than Corning had.*

And Buhl not having followed any of the statutory requirements, by leaving with any one a certified copy of his judgment and affidavit of amount, Austin could not learn the amount necessary to deposit, so that he might, as against Buhl, redeem from him.

The law requires certain acts performed to entitle any one to *acquire the title* on execution sale. *Redemption* is not what the statute means by purchasing or acquiring title. The assigning by Corning was not any step towards acquiring title under the statute. The statute must be strictly complied with:—22 *Barb.* 259; 27 *Barb.* 55; 6 *Wend.* 526; 20 *Wend.* 555; 7 *Paige*, 167; 19 *Wend.* 87; 7 *Hill*, 177; 18 *Wend.* 598; 2 *Comst.* 490.

Digitized by Google

Maynard & Meddaugh, and *G. V. N. Lothrop* for respondent:

A compliance with the statute—Comp. L. § 3147—is not a *condition* to the securing of a title as against subsequent judgment creditors.

1. Where the title is sought, as in this case, *directly* from the original purchaser, and he makes a voluntary conveyance, this provision in the statute is inoperative.

By the preceding provisions a judgment creditor may obtain the title from the original purchaser, and thereby secure the payment of his judgment from any subsequent judgment creditors seeking to redeem.

But the creditor holding title might refuse to convey; and to enable the party seeking it to enforce his right, section 3147 was added.

Its office is simply to fix the evidence necessary for the creditor to furnish in such cases: — 20 *Wend.* 555; 1 *Cow.* 443.

2. Where the title is sought of the original purchaser, or a judgment creditor, he may waive the "evidence of right" provided for by this section.

This must be so upon principle.

The evidence can answer no purpose in such cases except to satisfy the purchaser or creditor of the party's right, *under the statute*, to his title, and to enable the party to enforce such right.

It is intended solely for the benefit of the creditor seeking the title.

Had Buhl & Ducharme literally followed the statute in this respect, the relator could have derived no advantage from it.

Mr. Corning, a resident of the State of New York, could not have enlightened the relator in Detroit on the last day for redemption as to the contents of the papers "presented to and left" with him.

Digitized by Google

Between the date of the sale to Buhl & Ducharme and the day of redemption by the relator, the defendant might have paid Buhl & Ducharme's debt; in which case the evidence (had it been left with Corning) would have been of no more use to the relator than the judgment or the certificate of sale filed with the register.

Again, Mr. Corning was under no obligation, either of duty or of law, to preserve such evidence, and might have destroyed it the next moment.

We submit that had the Legislature intended this evidence when left with the purchaser or creditor, as in the nature of a public record, and for the benefit of other parties, interested in the title, a depository more appropriate would have been selected, and some provision for its preservation would have been added to the statute.

If, then, this evidence was intended *only* for Corning's benefit he might waive it.

The following authorities hold that a waiver may be made in such cases where the interest of subsequent judgment creditors is not involved. But *quære* as to them: —7 *Hill*, 91; 18 *Wend.* 599.

There is but one case to be found in the books opposed to this construction of the statute: — *People v. Ransom*, 2 *Comst.* 490. It is submitted that case can not be sustained.

3. The relator in this case had full notice, before seeking to redeem, of Buhl & Ducharme's judgment and of the fact that they had acquired Corning's title.

It has been repeatedly held under the registry acts that a knowledge of the facts which the registration would have afforded, is fatal to a claim resting upon the want of registration; and the analogy seems complete: — 15 *N. Y.* 354; 2 *Paige*, 205; 4 *Sandf.* 577; 8 *N. Y.* 274.

The registry acts usually make the non-registration fatal only as against *bona fide purchasers, &c., without notice.*

Were the language of these statutes broad enough,

Digitized by Google

however, to cover purchasers in good faith, their spirit is against it, and the courts must have so held.

Such has been the course of English decisions under a similar statute: — 1 *Y. & Coll.* 303; 15 *N. Y.* 354.

If the relator had such notice as should have put him upon inquiry even, it is sufficient: — 6 *Wend.* 213; 18 *Wend.* 588; 3 *Paige*, 421.

CAMPBELL J.:

This is an application to compel Fralick, as sheriff, to execute to Austin a deed of certain premises sold on execution against George B. Russell and others.

The execution sale was on a judgment in favor of Erastus Corning, who purchased the property. Buhl & Ducharme had a judgment on which a levy had been made after the first execution was levied, but before sale. The sale was made August 30, 1861. September 3d, 1861, a mortgage was made by Russell to Austin, the relator. November 10, 1862, Buhl & Ducharme paid Corning the amount due him, with interest, and took an assignment of his certificate of sale. On the last day allowed creditors to redeem, Austin, by his attorney, applied to the register of deeds and filed proofs of his mortgage interest, together with money to pay the Corning bid, but not to pay any portion of Buhl & Ducharme's judgment. The sheriff refused to convey to Austin, on account of the claims of Buhl & Ducharme. The attorney of Austin was informed of Buhl & Ducharme's claims before he attempted to redeem for his principal.

The objection made by Austin to the validity of Buhl & Ducharme's claim, is, that it does not appear that they furnished to Corning the proofs of their claim in the manner pointed out by section 3147 of the Compiled Laws. The statute provides that judgment creditors may redeem from execution purchasers in such a way as to become subrogated to their claims, whenever the premises

Digitized by Google

remain unredeemed by the debtor or his assigns within the twelve months allowed these. This payment to take up the claim of the execution creditor is required to be accompanied by copies of the judgments relied on, and an affidavit of the amount due. Application may be made to the register or sheriff, or to the purchaser himself. There is no provision declaring what shall be done with the papers.

Inasmuch as this payment by creditors can only be made after the debtor's redemption has run out, its effect is to allow the purchaser to be deprived of what may be an advantageous bargain, and it is only just that he should not be compelled to relinquish it without full proof of the right of the one who would supplant him. And he can not be compelled to receive any but full proofs. But where the application is made to himself, and he is convinced of the right of the applicant, there seems no good reason why he should be compelled to ask more proof. The proofs he receives come into his hands in his own right. He is not a public depository, and the papers do not become public by the deposite. No one else has any right to them. It is different where the redemption is made through a public officer. He being merely an agent by virtue of the law, must be guided by the terms of the statute; and papers intrusted to his custody become official, and enure to the benefit of such as may be concerned. But if the prior purchaser sees fit to allow a departure from the statute, a question may arise how far any third person can object to it.

We think that if Buhl & Ducharme were actually in a position to demand a transfer of the certificate, they must be protected when they have obtained it from the purchaser himself, whether they produced the statutory proofs or not.

But it was claimed on the argument that, by taking an assignment, they debarred themselves of the right to

Digitized by Google

claim the position of creditors exercising a privilege under the statute. The creditor is said in the statute to "*acquire the title*" of the execution purchaser. Subsequent parties applying are directly termed "*purchasers*": §§ 3137–8 3142. By section 3146 it is provided that "upon such payment being made, *the title of the original purchaser shall be thereby transferred to the creditor* acquiring the same," &c. This undoubtedly contemplates that the creditor may acquire the right without any formal transfer. But he would have a right to require some voucher for his payment. And, inasmuch as a transfer of title actually takes place, it is not easy to comprehend how it can be vitiated by expressing what the law implies. It would require strong evidence to justify a court in assuming that Buhl & Ducharme deliberately took this course to divest themselves of a right which could in no way compromise or prejudice them, while, on the other hand, its exercise might become valuable, and must necessarily have been so had the property been worth buying from Corning. Every presumption from the facts must tend to satisfy any reasonable mind, that the parties never intended to give up any rights; and we do not think they have done so unless such an intention appears.

Having lawfully acquired the rights of Corning, the statute does not allow their purchase to be divested in favor of any claim accruing subsequently to their judgment, without payment of their own judgment in addition to the purchase money. *Comp, L.* § 3141; *Laws of* 1861 *pp.* 134, 135.

This, Austin did not attempt, although informed of Buhl & Ducharme's claim. His payment therefore was inoperative, and gave him no rights.

The judgment below must be affirmed, with costs.

MARTIN CH. J. and CHRISTIANCY J. concurred.

Digitized by Google

MANNING J.:

The right of redemption is a statutory right, to be acquired in the manner pointed out by the statute, and in no other. The statutory requirements are conditions precedent, and may be insisted on not only by the purchaser at an execution sale, but by any one having a right to redeem who has done all the statute requires to enable him to redeem. A purchaser may waive these conditions as to himself; but he can not, by such waiver, give the person in whose favor it is made a priority over one who has complied with the statute. By paying Corning the amount of his bid, and taking an assignment of the sheriff's certificate of sale, Buhl & Ducharme acquired the rights of Corning and nothing more. They acquired no rights under the statute, because they did not comply with its provisions. The language of the statute is peremptory. It is in these words:

"To entitle any creditor to acquire the title of the original purchaser, or to become a purchaser from any other creditor pursuant to the preceding provisions, he shall present to, and leave with, such purchaser or creditor, or the officer who made the sale, or with said register, the following evidence of his right:

1. A certified copy of the judgment or decree under which he claims the right to purchase;

2. A true copy of all the assignments of such judgment or decree which are necessary to establish his claim, verified by his affidavit, or the affidavit of some witness thereto;

3. An affidavit by such creditor, his agent or attorney, of the true sum due on such judgment or decree, at the time of claiming such right to purchase." *Comp. L.* § 3147.

The following cases under a similar statute of the state of New York sustain the views above expressed:

Digitized by Google

—*Buck v. Fox*, 23 *Barb.* 259; *Hall v. Thomas*, 27 *Barb.* 55; *People v. Livingston*, 6 *Wend.* 526; *Waller v. Harris*, 20 *Wend.* 555; *Waller v. Harris*, 7 *Paige*, 167–77; *People v. Sheriff*, 19 *Wend.* 87; *Ex parte Bank o Monroe*, 7 *Hill*, 177; *People v. Covell*, 18 *Wend.* 598; *People v. Ransom*, 2 *Comst.* 490.

I think the judgment should be reversed, and a mandamus issued.

Judgment affirmed.

VanRenselaer T. Angell v. John J. Rosenbury.

Assignment for the benefit of creditors: insolvency of assignee.—In making a general assignment for the benefit of creditors, the utmost good faith is required of the debtor in selecting his assignee. The selection must be made with reference to the interest of creditors, rather than that of the debtor. Hence, if the assignee be so deficient in age, health, business capacity or standing, pecuniary responsibility or character for integrity, that a prudent man, honestly looking to the interest of the creditors alone, would not be likely to select him as a proper person for the performance of the trust, then his selection will furnish an inference, more or less strong, according to the circumstances, that the assignor was actuated by some other motive than a desire to promote the interest of creditors.

When a general assignment for the benefit of creditors is assailed as fraudulent, evidence of a general reputation that the assignee is insolvent is admissible, not only as tending to prove insolvency in fact, but also because, if the assignor has knowingly assigned to a person having the reputation of insolvency, this fact would have a tendency to show that the assignment was made for the purpose of inducing creditors to compromise, even though the assignor believed him solvent in fact.

Witness giving reasons for his attention to the facts to which he testifies.—A witness called to impeach such an assignment, testified that the assignor and assignee had requested him to assist in bringing about a compromise with the creditors, and had showed him notes upon which the assignee made a claim under the assignment. Being shown notes which had been produced on this trial as the same, he pointed out some differences in appearance, and stated that he gave particular attention to the notes first mentioned, as to their appearance, the ink, &c. Held that he might then be asked to state any reason or circumstance which induced him to do so.

Proof of record without giving copy.—The deposition of a register of deeds to the contents of deeds recorded in his office, without giving copies thereof, is inadmissible. And when the purpose for which it is offered is collateral to the issue, the rule is the same as in other cases.

Digitized by Google

ANGELL v. ROSENBURY.

Presumption as to objection to incompetent interrogatories having been waived. — Incompetent testimony having been taken on interrogatories and cross interrogatories under a commission, and the Court below having overruled objections thereto, the case was brought up for review on exceptions. On error, it was claimed by the party who had offered the evidence, that error could not be presumed, and as the record did not show how the interrogatories were settled, it must be presumed that objection was waived, and the putting of a cross interrogatory which called for and elicited evidence of the same nature was a waiver of any objections to the evidence brought out by the direct interrogatory. But it was held — nothing appearing to the contrary — that it must be presumed the interrogatories were settled in the usual way, under the statute and rules; and in such case the party may make objection to the competency of the evidence for the first time at the trial. *Comp. Laws*, §§ 4257, 4248.

Request for instructions to the jury how construed.—On error the Supreme Court must construe a request for instructions to the jury as it must have been understood by the Court and jury had it been given. It must therefore be construed in reference to the evidence in the case upon the subject to which it alludes.

Assignment for benefit of creditors: badges of fraud. — Where it appears that the assignee, a short time before the assignment, as an inducement for a third person to loan the assignor money, stated that the latter was perfectly good, and not owing much, the setting up by him of a large preferred claim under the assignment, as having been owing to him before such statements were made, is strong evidence of fraud in the assignment.

Assignment by one who is solvent, or believes himself to be so.—The mere fact of the solvency or insolvency of one who has made a general assignment, or his belief in the one or the other, does not necessarily render the assignment void. Without any fraudulent intent in either case it would be valid, and with a fraudulent intent it would be void in both cases alike.

Assignment to prevent sacrifice of property. — The fact that a general assignment is made by an embarrassed debtor, whether solvent or insolvent, to prevent a sacrifice of his property, does not necessarily, of itself, render the assignment void. If the sacrifice is sought to be avoided for the sole purpose of giving creditors the benefit of the property, which in case of a sacrifice they would not be likely to obtain to the same extent, then, whether solvent or insolvent this is an honest purpose, and should not invalidate the assignment. But if the sacrifice is sought to be avoided for the purpose of enabling the assignor to reap a greater benefit, by securing a larger surplus, or retaining the control or use of the property, or in any other way, or for the purpose of compelling a compromise, then the purpose is fraudulent, and the assignment is void.

Deed in trust may convey a fee without the word "heirs." — In a conveyance in trust for the sale of land and for the payment of debts from the proceeds, the word "heirs" is not necessary to convey a fee. The trustee must be held to take an estate as large as may be necessary for the purposes of his trust whether the conveyance contain words of inheritance or not.

Heard October 30th & 31st, 1863. *Decided January 8th.*

Error to Livingston Circuit.

G. V. N. Lothrop, for plaintiff in error:

1. The first question presented is, whether it is com-

Digitized by Google

petent to give evidence of the reputation of the assignor, for solvency or insolvency.

It is clear that it is the duty of an assignor to select a solvent responsible assignee; his failure to do so is an indication of fraud;—*Burrill on Assignments*, 66; 1 *Sandf. Ch.* 254; 1 *Barb.* 210; 1 *Binney*, 502; 8 *Paige*, 417.

The solvency of Rosenbury was therefore a material question. He lived in a distant State. He had no business here; and the very first questions that a creditor would ask, would be, Who is he? What his business? What his standing and reputation, as to character and property, in Penn Yan?

As these were answered would be the conclusion formed. And it is safe to act on these inquiries. A man may be reputed to be solvent, who is not in fact so. But a man who is really solvent, will never have a confirmed reputation of insolvency.

The return of an execution *nulla bona* would be unquestionably competent evidence; yet it is undeniable that it would be much less satisfactory evidence among men of sound judgment, than a general settled reputation of insolvency. And as that evidence is competent which most satisfactorily proves the truth or falsity of a matter, reputation on this subject is competent by the highest test:—1 *Greenl. Ev.* § 101; 2 *Dev.* 63; 11 *Wend.* 96; 18 *Vt.* 87.

And I maintain that this evidence is specially fit and appropriate, in cases where the assignor is bound to select a man who is not only in fact honest and responsible, but also one who is reputed to be such. He is bound to give his creditors obvious and ready grounds of confidence; if he does not, if he appoints men whose moral and pecuniary reputation are such as to inspire distrust and alarm, then, certainly, this is a badge of fraud proper to be considered, both by the creditors, and by any tribunal investigating the validity of the assignment.

2. The next point is the refusal of the court to allow

Digitized by Google

the witness Hinman to state any answer or circumstance which called his special attention to the condition of the notes shown him by Wilbur and Rosenbury, at Wilbur's store.

The ground of this refusal, I certainly do not understand. As going directly to the weight of this testimony, it seems to me that the question could not properly be rejected.

3. The third point is presented in the deposition of Olmsted. He was allowed to state that he had found in the register's office, for Potter county, Pennsylvania, the records of certain deeds, and to give a statement of the contents thereof. This is clear error. A document or a record can only be proven by the original, or by copy: — 1 *Greenl. Ev.* §§ 83, 84, 85, 86, 501.

4. Rosenbury told Sexton, in the winter before the assignment, that Wilbur was not indebted to any extent, and tried to get him to lend Wilbur money. He said Wilbur was perfectly good.

When he showed the notes to Hinman, at the store, and at Harmon's office, he and Wilbur fixed the amount due on them at about $9,000. This was stated to enable Hinman to state to the New York creditors the amount of preferred claims, and to induce them to compromise.

Now, such conduct as this is the most direct and downright fraud. Yet under the charge of the Judge, the jury might well infer that such acts had no decided character in the eye of the law.

Stating fictitious debts by the assignor, has always been regarded as decisive evidence of fraud: — 1 *Sandf. Ch.* 83; 2 *Barb.* 9; 2 *Sandf. S. C.* 594; 36 *Barb.* 292.

And how strong the badge became under the evidence in this case!

As to badges of fraud, see *Burrill on Assignments*, 9

5. The fifth point arises on the request to the court

Digitized by Google

to charge the jury, that, if they found that Wilbur was solvent, or believed he was so when he assigned, then the necessary effect was to hinder, etc., and that the assignment was void.

I take it to be settled that where an assignment is made, not for the purpose of a distribution of the debtor's property, but primarily to delay creditors in their collections, it is fraudulent and void: — 3 *Barb. Ch.* 646; *Nicholson v. Leavitt*, 2 *Seld.* 516; *Buck v. Sherman*, 2 *Doug. Mich.* 176.

And it seems clear to me that when a solvent person makes such an assignment, the necessary and primary intent is to delay his creditors in their collections. He does this, also, for an advantage to himself, namely, to enable him to save a larger surplus out of his property.

I then take the broad ground, that no assignment by a solvent person, or one believing himself to be so, can be otherwise than fraudulent in the law. See *Kellogg v. Slawson*, 15 *Barb.* 56; *Ogden v. Peters*, 15 *Barb.* 560.

6. The Court refused to charge that the assignment conveyed only a life estate in the real estate.

This was error. No fee passes, or can pass by deed, without the word "heirs": — 1 *Bl. Com.* 83; — 4 *Kent*, 5.

And the Court also refused to charge that, if Wilbur intended to reserve the remainder to himself, the assignment was void.

When a debtor assumes to make a *general* assignment for the benefit of his creditors, he must convey *all* of his property. And it is especially fraudulent, if, under such an assignment, he purposely uses terms which will leave a part of the property in himself: — 11 *Wend.* 187; 1 *Hilton*, 462; 3 *Md.* 40; 8 *Md.* 418; 11 *Md.* 376.

Wilcox & Waddell, and *S. T. Douglass*, for defendant in error:

1. The evidence of hearsay and reputation to prove that Rosenbury was insolvent and irresponsible, was inad-

Digitized by Google

missible. To hold otherwise would be to introduce a new exception to the general rule excluding hearsay, not recognized by any authoritative text writer, or by any English decision, and against the general current of American authority: — 16 *Pick.* 567, 570; 13 *Geo.* 408; 25 *Ala.* 139; 9 *Ind.* 158.

2. The question to Hinman: "Will you state any good *reason* or circumstance which led you to give particular attention to the notes, the ink and the edges," was properly overruled.

a. It was improper in so far as it called for the witness's *reason* for scrutiny.

The state of his own mind — his *opinion* or *suspicion* that the notes were fraudulent or fictitious, and were made long after they purported to be — would have been good *reason* for scrutiny. A statement of such reason would have been a proper and natural answer to the question propounded, and the answer which the question was, doubtless, artfully designed to elicit.

It will not be claimed that any such *opinion* or *suspicion* could properly be given in evidence to the jury.

b. The question was, to some extent leading. That was not probably the ground upon which it was objected to, but as the grounds of objection are not stated in the bill of exceptions, any objection may be urged here which *could* have been urged on the trial: — 3 *Hill*, 396; 20 *Geo.* 140.

3. Olmsted's reply to the 4th interrogatory in respect to what conveyances to Rosenbury appeared of record in Potter Co., Pa., was properly admitted.

a. What lands Rosenbury owned in Pennsylvania was matter wholly *collateral* to the question in issue, and for this reason provable by parol, without the production or proof of his title deeds: — *Anth. N. P.*, 40; 10 *Johns.* 442; 11 *Wend.* 667; 17 *Mass.* 160; 2 *Bail.* 324.

b. What the 4th interrogatory was does not appear, nor does it appear whether the interrogatories were agreed

Digitized by Google

upon or not, nor whether, if agreed upon, it was with or without any saving of just exceptions; nor whether, if settled by a judge, any objection was made to this interrogatory at the time of the settlement. It does, however, appear that the defendant put a cross interrogatory, which called for and elicited the same evidence (only in more detail) elicited by the 4th direct interrogatory.

It must be presumed that the 4th direct interrogatory called for just the response which the witness gave to it: — *Francis v. Ocean Ins. Co.* 6 *Cow.* 404.

If such interrogatory was agreed to by the defendant without saving just exceptions, he would not afterwards be heard to object to the answer on the ground that it was secondary evidence.

And in the application of the general principle, that the ruling of a court admitting or rejecting evidence will be presumed right unless the bill of exceptions shows affirmatively that it was wrong (6 *Gray*, 510), it must in this case be presumed, in the absence of any showing on the subject, that the interrogatories were settled by agreement, without any saving of the right to except.

However settled, the defendant having made no objection to the 4th interrogatory at the time of the settlement, on the ground that it called for secondary evidence (for it can not be presumed that any such objection was made without any showing on the subject) and having himself propounded a cross interrogatory, calling for the same evidence, he must be deemed thereby to have waived any such objection to evidence elicited by the direct interrogatory: — 32 *Ala.* 500, 502.

Sec. 4257, Comp. L., does not apply where the party has either expressly or by implication waived his right to object.

4. The Court properly refused to instruct the jury "that if they should find that Rosenbury *made statements* before the assignment that Wilbur was not indebted to

Digitized by Google

any considerable extent, then the setting up the notes held by Rosenbury as just claims, *in the assignment*, would be strong badges of fraud."

a. This instruction (unless unmeaning) would have been a direction to the jury to assume that Wilbur was not *in fact* indebted to any considerable extent, if they should find that Rosenbury had made statements to that effect. Whereas, Rosenbury's statements were mere *evidence* of the fact, which, however strong, was not indisputable.

b. It assumes that the notes were set up as just claims "*in the assignment*" *to their full amount, or for more than was due upon them;* whereas such was not the fact.

c. If it is claimed that the instruction merely assumes that the notes were so "set up" *under* and not strictly "in" the assignment (waiving the question of whether the language used will admit of this construction), we say, whether they were "so set up" was a question of fact for the jury, which the Court could not properly withdraw from their consideration, by assuming that they were.

5. The Court properly refused to instruct the jury that, if they found *either* that Wilbur was solvent, *or* that he believed he was so when he made the assignment, then the assignment was void.

That he was in fact solvent would not invalidate the assignment if made in good faith, and in the belief that he was insolvent.

Nor would his mere *belief* that he was solvent, when in fact he was not: — *Burrill on Assignments*, 41; *Ogden v. Peters*, 21 *N. Y.* 23; *Savery v. Spaulding*, 8 *Clarke*, (*Iowa*) 239.

To be solvent in such a sense that the fact could cast even a suspicion upon the good faith of an assignment, the debtor must be able *presently* to pay all his debts, by the application of all his means, or be in such a condition that his creditors can collect all their debts by legal process: — *Burr. on Assignments*, 38, 42.

Digitized by Google

The evidence does not tend to prove that Wilbur was in this sense *solvent*, or that he believed he was, but only that a few days after the assignment he expressed the opinion that the assigned property (the assignee being allowed time to dispose of it to the best advantage) would pay all his debts and leave a surplus.

6. The assignment conveys the fee of the real estate therein mentioned:—15 *Md.* 63; 9 *Gill*, 261; 4 *Kent*, 304; 2 *Wash. Real Pr.* 186, 44.

CHRISTIANCY J.:

Rosenbury, the plaintiff below, sued Angell in an action of trespass, for taking and carrying away certain goods. Rosenbury claimed title under an assignment made to him by one Charles A. Wilbur, June 25th, 1855, ostensibly for the benefit of creditors. Angell, who was sheriff of Livingston county, had seized the goods under several writs of attachment at the suit of Wilbur's creditors. Wilbur, the assignor, appears to have been a merchant doing business at Howell, Livingston county, Michigan, for some time before the assignment, but his stock having run down in December, 1854, to about one hundred and fifty dollars in value, he then thought proper to replenish it by sending his clerk to New York and making purchases, through his agency, to the amount of about six thousand dollars, on six months credit; on which the clerk, who made the purchases, and testifies to them, is not aware that any thing had been paid at the time of the assignment.

Rosenbury, the assignee, was the brother-in-law of Wilbur, residing in Penn Yan, New York, where Wilbur had also resided till 1846; and Wilbur says Rosenbury had resided there for fifteen or twenty years, and he had known him for that period. His testimony shows an intimate acquaintance and considerable business transactions with him for a considerable portion of that time. Rosenbury had come out, in November or December, 1854, and

Digitized by Google

spent the winter at Howell, and left in March or April, 1855; not having, so far as Wilbur knows, any business at that place. He however appears to have taken a friendly interest in Wilbur's affairs, as we find him during the winter urging one of the witnesses to lend Wilbur more money, saying he was perfectly good, and not owing much. About the time the six thousand dollars must have become due for the December purchases, and three or four days before this assignment was executed, Wilbur, according to his own account, was on his way to Detroit to get an assignment prepared, when he unexpectedly, as he says, met Rosenbury on the road in the stage, on the way to Howell, as it would seem. Wilbur went on to Detroit, and seems to have got an assignment prepared; as he says, after his return from Detroit, he "had a new assignment" — the present one — drawn by Mr. Whipple, which was executed June 25th, 1855.

Rosenbury is made a preferred creditor in the assignment, the amount not stated, but stated to be "for notes and accounts not liquidated," though it appears from the testimony of Wilbur, who was sworn in his behalf, that Rosenbury had no claim except certain notes which he says amounted to $7000 or $8000, perhaps more. These notes, or what were claimed by plaintiff to be such — as subsequently produced under a notice for that purpose from the defendant below — were four, of one thousand dollars each, dated July 19th, 1845, payable to one Glover or bearer, in one, two, three and four years respectively, with annual interest, and one note for seven hundred and fifty dollars, given to Rosenbury March 9th, 1842, payable on demand. Against these notes Wilbur admits he had a large offset, for goods, boarding Rosenbury, &c., and calculated he did not owe much beyond the offset. The notes had never been renewed, nor any thing indorsed on them, nor any receipt given to apply on them. They had never settled, and the amount was not liquidated or

Digitized by Google

known at the time of the assignment, nor even at the time of this trial, in June, 1862, which seems to have been the third trial of this cause: and it does not appear whether any thing was due, or, if so, how much. Wilbur says he don't think there was a thousand dollars, and that at the time of the assignment he did not know whether he owed Rosenbury any thing or not. Rosenbury claimed that he did, and — to use his own words — he "might have owed him considerable or not." All this came out on his cross examination, at the beginning of which he had testified that the preferred claim of the plaintiff was just: that is, what was due; but he didn't know how much was due him.

The defendant below, claiming the assignment to be fraudulent as to Wilbur's creditors, undertook to impeach it by showing that Rosenbury, the assignee, was insolvent. For this purpose he introduced the depositions of several business men of Penn Yan, where Rosenbury resided, and who had known him from 1840 down to about the time of the assignment, all of whom testified fully to his reputation for insolvency during that period. Upon this point as well as the witnesses' means of knowledge, the depositions were full and clear. But to so much of these depositions as related to his reputation for insolvency, the plaintiff below objected; and the Court sustained the objection and excluded the evidence. This is the first question for our consideration.

While we express no opinion whether insolvency, as a legal status, can be proved by reputation when that is the direct question in issue, we are entirely satisfied that the testimony was admissible in the present case on more than one ground. *First*, — though the point can hardly be said to be necessarily involved in the present case — we think it was admissible as tending to show insolvency in fact. The fact of insolvency is one in its own nature, in most cases, hardly susceptible of direct or positive proof. Clear

Digitized by Google

knowledge of the fact must generally be confined to the party whose insolvency is in question — who in the present case is the plaintiff himself — (and though under our present statute he may be sworn as a witness, we can not hold the defendant bound to resort to that mode of proof more than before the statute, especially as he may be sworn in his own behalf to rebut any proof defendant might introduce). The fact, then, must generally be proved by circumstantial or presumptive evidence — by the proof of other facts from which insolvency is to be inferred. Among the particular facts admissible for the purpose, and thought to be of much weight, and most generally resorted to, is the return of an execution against the party unsatisfied. And yet as an execution does not reach rights in action, nor (in this and most other states) mere trusts; and as the defendant may have any amount of money and even other property so situated as not to be found or reached by the officer, it is easy to see that the defendant in the execution may be (and it is notorious that he often is) a wealthy man in fact, notwithstanding the officer has been entirely unable to find property subject to execution. This is so well understood that the return of an execution unsatisfied would, alone, seldom, if ever, give a man a general reputation for insolvency. Any thing like a common or general reputation for insolvency would not be likely to arise without the observation of numerous other facts, such as the acts and conduct of the party for a considerable length of time, indicating a want of means, and an inability to pay his debts. And as we know from common experience that, though men really insolvent often appear to the public for a considerable time as men of property, very few, if any, ever get a general reputation for insolvency who are not insolvent in fact; we think the general reputation of a man as insolvent in the neighborhood in which he resides, and among men whose dealings and interests prompt them to

Digitized by Google

observation and inquiry, is much more satisfactory evidence of insolvency than that of the particular facts most generally relied upon for the purpose; especially where, as in the present case, such has been the unquestioned reputation of the man for a great length of time. It is the deliberate judgment of the community — based upon the observation of a much greater number of facts than it can generally be practicable to introduce in evidence.

But the purpose for which the evidence was introduced in the present case did not require proof of the absolute insolvency of the plaintiff, as a legal status. The evidence was material only so far as it tended to prove a fraudulent intent in making the assignment.

The right of an embarrassed debtor to make an assignment, and to select his own assignee, without, and against, the consent of his creditors, has been finally admitted, in most of the states of the Union; though the propriety of recognizing such a right has often been questioned, and, if the question were a new one, might well be doubted. But to prevent the abuse of the right, and to avoid its being made a convenient engine of fraud, the utmost good faith must be required of the debtor in the selection of the assignee. That selection must be made with reference to the interest of creditors, rather than that of the debtor. Hence, if the assignee be so deficient in age, health, business capacity or standing, pecuniary responsibility or character for integrity, that a prudent man honestly looking to the interest of the creditors alone, would not be likely to select him as a proper person for the performance of the trust; then his selection will furnish an inference more or less strong, according to the circumstances, that the assignor, in making the selection, was actuated by some other motive than the desire to promote the interest of creditors: in other words, an inference of intent to hinder, delay or defraud his creditors. And this inference will be strengthened if the assignee be a clerk or near relative,

Digitized by Google

or a person likely to be easily influenced by the assignor; as this would tend to raise a presumption that the assignment was intended to be made use of for the assignor's benefit, or that there was some secret trust in his behalf. Any thing, therefore, which tends to show that the assignee, in any respect, is not such a person as an honest and prudent man would be likely to select for the position, with reference to the interest of creditors, must, upon principle, be admissible to impeach the good faith of the assignment: (the weight of the evidence would, of course, depend upon the degree of unfitness shown). In this view it is well settled that the selection by the assignor of a person known to him to be insolvent, is very strong evidence of a fraudulent intent. This is upon the principle that, as the assignee is not by law compellable to give security for the assets, or the faithful performance of the trust, the assignor, in placing the property beyond his own control and that of his creditors, ought to place it in the hands of such person as will be able to respond to creditors for the waste or wrongful disposition of the assets, or the mal-administration of the trusts. The principle, therefore, is not confined to actual insolvency, but extends to any case where the property or pecuniary means of the assignee are clearly inadequate to this end, or any state of pecuniary embarassment likely to deprive the creditors of this security. Not that this consideration, of itself, is always a controlling one, or decisive of the question of fraud; as the high character of the assignee for integrity and business capacity may sometimes compensate, in a great measure, if not entirely, for his want of pecuniary means, and afford nearly, if not quite as strong assurance to creditors that the fund will be safe in his hands, and that the trusts will be faithfully executed.

The inquiry, therefore, is not so much whether the assignee is strictly, in a legal sense, insolvent, but what is

Digitized by Google

the state of his property and his pecuniary standing? And upon principle, as well as authority, we think this may be proved by reputation. See *State v. Cochran*, 1 *Dev.* 63; *Hard v. Brown*, 18 *Vt.* 87; *also Heywood v. Reed*, 4 *Gray*, 574.

Decisions have been cited to the contrary where the question arose somewhat as it does here. But we think the decisions above cited are founded upon the better reasons. In Alabama proof of insolvency by reputation is rejected, on the ground that insolvency is a legal condition — a conclusion of law from particular facts — and yet in the cases in which it was so held, it is not easy to see how it was any more a conclusion of law from particular facts, than fraud in the present case, or character in ordinary cases, is a conclusion of law from the particular facts which go to establish the general resultant fact of fraud or character. But, while the courts of Alabama reject proof of insolvency by reputation, yet, with a singular inconsistency, as it seems to me, they allow the particular facts from which insolvency is to be inferred, to be proved by reputation; which, I think, is much more objectionable, both upon principle and authority.

But *second*, I think reputation of insolvency is admissible in cases like the present, independent of its tendency to prove insolvency or a less degree of pecuniary embarassment in fact. It is well settled that an assignment made by a debtor for the purpose of inducing a compromise on more favorable terms than he could otherwise obtain, is fraudulent. Now, whatever may be the condition of an assignee as to solvency, as known to himself: creditors have not his means of knowledge, and they must judge of the fact as it appears to the public — in other words, mainly by reputation. It is upon this they must generally form their judgment, and decide upon their course, whether it is best to run the risk of a suit, or to assent to such compromise as the debtor may choose to offer. And if

Digitized by Google

the assignee has a confirmed reputation for insolvency, we can not fail to see, that all prudent creditors would be much more likely in ordinary cases to consent to a compromise on the debtor's own terms, than if the assignee were reputed to be solvent, and able to respond for malversation or breach of trust. In this view we can not resist the conclusion, that, if the assignor has knowingly assigned to a person having the reputation of insolvency, this fact would have a tendency to show that the assignment was made for the purpose of inducing a compromise, even though the assignor believed him solvent in fact (and there was certainly enough in the case to authorise the jury to infer a knowledge on the part of Wilbur of this reputation of Rosenbury); and this tendency would be greater or less, according to the character or fitness of the assignee in other respects, and the other circumstances of the case. But its tendency to prove that such was the purpose of the assignment would be very strong, when, as in this case, the assignor and assignee are shown to have acted together in their endeavors to procure a compromise, after the assignment was made. We think, therefore, the Court erred in excluding the depositions referred to.

The next error assigned is the rejection of the question put to the witness, Hinman, asking him to state any reason or circumstance which led him to give particular attention to the four notes. To understand the nature of this objection it is necessary to see how the question arose. Hinman had already testified that, in August, 1855, he was applied to by the *plaintiff and Wilbur* to aid in getting a compromise with the New York creditors. He told them that, to enable him to do so, they must make a statement of their matters; and they showed him four notes, as the basis of the plaintiff's claim. In this stage of the trial, as it would seem, while Hinman was still under examination as a witness, the plaintiff, under a notice from the defendant to produce the notes, produced the

Digitized by Google

five notes which I have already described. The witness, after looking at the notes, testified, "I can not state whether the notes now produced are the same which were shown me by the plaintiff or not. If they are, I was mistaken in the date. My recollection is, that the four $1000 notes shown me were dated June 15th, 1842. The same notes were soon afterwards shown me at the office of Harmon. The $750 note has the same appearance as the note just shown me. The other four differ in my recollection in the appearance of the paper and date. Those first shown me were clean. These are more dilapidated and worn. I gave the four notes particular attention as to their appearance, the ink, and the edges." He was then asked, on the part of the defendant, "Will you state any reason or circumstance which led you to do so?" This was objected to, but the grounds are not stated, and the question was rejected.

We think the rejection of this question was erroneous It was very important, in determining the credit to be given to the witness's recollection, to know whether any or what reason existed at the time to induce the witness to give particular attention to the appearance of the notes. The value of his recollection would depend entirely upon the degree of attention with which he observed the facts, and the reasons which operated upon his mind to excite that attention, and to fix the facts in his memory. He should therefore have been allowed to state any facts which had that effect, whether relevant to the issue or not. The rejection of the question was unfair both to the defendant and the witness. We see nothing objectionable in the form or substance of the question. It was not leading: and the generality of its form was in some measure necessary to avoid suggesting any particular answer.

The next error assigned is the admission of the deposition of Olmsted, the register of deeds of Potter county, Pennsylvania, testifying to the contents of certain deeds to

Digitized by Google

the plaintiff, Rosenbury, there recorded. This evidence was offered to rebut the evidence on the part of the defendant tending to prove the insolvency of the plaintiff, or his want of property. No deed nor any copy of a deed was proved or attached, nor was any offered in evidence. The testimony is claimed to be admissible on the ground that the question of Rosenbury's title was only collateral to the issue. But the question upon this testimony is not one of reputed ownership, but simply whether *the contents* of the deed or of the record could be proved by parol. We understand the rule to be well settled that, when the contents of a deed or other writing are to be proved, though only collateral to the issue, the rule is the same as when the matter is directly in issue: and the same ground must be laid for the introduction of parol evidence: — *Cow. & Hill, Notes to Phil. Ev.* (*Ed. of* 1839) *note* 452 *pp.* 1210 *to* 1212. *Same work by Edwards, vol.* 2 *pp.* 512 *to* 514; 1 *Greenl. Ev.* §§ 88, 89.

But as the deposition was taken upon written interrogatories under a commission, and there was a cross interrogatory upon the part of the defendant which called for and elicited evidence of the same nature, and it does not appear whether the interrogatories were agreed upon, or whether, if so, it was with or without the reservation of exceptions; or whether, if settled by the Judge, any objection was made by the defendant; it is urged that it must, on error, be presumed that no objection was made, and the putting of the cross interrogatory was a waiver of any objections to the evidence elicited by the direct interrogatory.

Though it is for the plaintiff in error to show by his bill that error has been committed, we do not think it was necessary for him to set forth the negative fact, that he had not agreed to the direct interrogatories, as framed, or that he had not consented to waive any objections, unless something appears in the bill to indicate that he had done so; and nothing of this kind appears here. There

Digitized by Google

is nothing in the bill to indicate that the deposition was taken or the interrogatories settled by agreement, or in any other than the usual and legal way pointed out by the statute and rules of Court: and the presumption must be that the deposition was taken and the interrogatories settled in this way, until something appears in the bill to indicate the contrary. If the objection had been waived by agreement, so important a fact, so decisive against the objection, and which must have been so directly before the mind of the Judge in deciding upon the objection and in settling the bill, we can not suppose would have been omitted without imputing to the Judge a want of ordinary intelligence, as well as of candor and fairness. We must therefore treat it as a deposition taken under the statute and rules of court.

By reference to *Comp. L.* § 4257, it will be seen that "any objection to the competency or credibility of a witness so examined, or to the competency or relevancy of any question put to him, may be made in the same manner, and with the like effect, as if such witness were personally examined at such trial." *See also in connection, Ibid.* § 4248. This, we think, reserves to the party the right to make his objection for the first time at the trial, though he may have been present when the interrogatories were settled, and may have put cross interrogatories upon the same matter: and that the putting of such cross interrogatory is no waiver of the objection to the direct interrogatory to which it relates. Such has been the course of decision in the state of New York under a statute substantially like ours. *See Fleming v. Hollenback*, 7 *Barb.* 273; *Morse v. Cloyes*, 11 *Barb.* 100; *Commercial Bank of Penn. v. Union Bank*, 11 *N. Y.* 203. The same practice seems to exist in Ohio and in South Carolina, and, as I infer, without any special provision of statute. *See Cowan v. Ladd*, 2 *Ohio N. S.* 322; *Ellis v. McBryde*, 9 *Rich.* 269: and by statute in Massachusetts in

Digitized by Google

cases where the depositions are not taken on written interrogatories, though both parties are present at the taking:—*Atlantic & Marine Fire Ins. Co. v. Fitzpatrick*, 2 *Gray*, 279; *Heywood v. Reed*, 4 *Gray*, 574; *Palmer v. Crook*, 7 *Gray*, 418: *and see Lord v. Moore*, 37 *Me.* 208. It is true our statute does not, like those of Massachusetts and New York, *expressly* reserve the right to object to the *answer*. But we think the right to object to the question *on the trial*, must also extend to the answer: and if it be said that the right to object to the answer must depend upon the question being objectionable, still, though the interrogatory does not here appear, it must be presumed to have called for the answer the witness gave it:—*Francis v. Ocean Ins. Co.*, 6 *Cow.* 415. If the direct interrogatory and the answer to it be rejected, as incompetent, the cross interrogatory and answer, being dependent upon it, must also be rejected:—*Ellis v. McBryde, supra; Fleming v. Hollenback*, 7 *Barb.* 273. (The last case was overruled in *Cope v. Sibley*, 12 *Barb.* 521, upon another point, but not upon any question involved in the present case.) We think therefore the deposition of Olmstead, so far as it purported to state the contents of the deeds mentioned, was erroneously admitted.

The next error assigned is the refusal of the Court to charge, that, "if the jury should find that Rosenbury made statements before the assignment that Wilbur was not indebted to any considerable extent, that the setting up of the notes held by Rosenbury, as just claims in the assignment, would be strong badges of fraud." The language of this request has been criticised by the counsel for the defendant in error. Its grammatical accuracy will hardly be insisted upon, and perhaps it is open to the criticism that it does not, abstractly considered, express the idea intended to be conveyed. But we think it fair to construe a request of this kind as it must have been understood by the Court, and by the jury had the charge been

Digitized by Google

given as requested. For this purpose it should be construed with reference to the evidence in the case upon the subjects to which it alludes. When considered in this light, though it may fall short of expressing the whole proposition intended, we think it was a sufficiently intelligible expression of a proposition which the defendant was entitled to have embodied in the charge. Saxton had testified that, in the winter previous to the assignment, plaintiff in Wilbur's store had asked the witness why he did not lend Wilbur more money, saying Wilbur was perfectly good and not owing much. Hinman testified that, at the first interview with plaintiff and Wilbur, in August, 1855, they both fixed the amount due plaintiff (meaning, as the former portion of his testimony shows, upon the notes), at nine thousand dollars; and that at a subsequent interview at Harmon's office, plaintiff stated his claim at the same sum. This was stated as the amount of the plaintiff's preferred claim, under the assignment, and to enable Hinman to effect a compromise with the New York creditors; and must of course have been intended to be communicated to these creditors as an inducement to a compromise. When the request is construed with reference to this evidence, to which we think it must have been understood by the Court and jury to relate, it must, we think, be understood as a request to charge, that, if the jury should find the plaintiff had made the statements testified to by Saxton, then the setting up of the notes as just claims in or under the assignment (the difference in the propositions will not materially alter the sense) in the manner stated by Hinman, would, if found true, be "a strong badge," or a strong indication or evidence, of fraud (for this is the sense in which "badges of fraud" are used): *see Burrell on Assignments*, 433, 434.

We do not think this request fairly open to the objection urged, that it required the jury to assume that Wilbur was not much indebted in fact, if Rosenbury should

Digitized by Google

be found to have so stated. If this fact (that he was not much indebted) were established, then the setting up of the notes in the manner and to the amount stated by Hinman, would, if found true, not only be a badge, or evidence of fraud; but would of itself constitute fraud. The request, however, only asks for a charge that it would be evidence of fraud. Nor do we understand the request as requiring the jury to assume that the notes were in fact "set up". The language is "the setting up the notes *would be*" (not was or is) strong badges of fraud: leaving, as we think, the jury to determine whether they were thus set up. The request would have been more logical in form had it been that the statement of Rosenbury referred to, *and* the subsequent setting up of the notes—should the jury find both these facts — would be strong badges (or evidence) of fraud. But such, we think, was the effect of the request; as both facts were left to the jury, and the latter fact was not asked to be treated as evidence of fraud without the finding of the former.

The statement of Rosenbury alluded to would tend strongly to show that Wilbur could not have been indebted to him in the amount of nine thousand dollars upon the notes, the amount at which the testimony of Hinman tended to show they were set up by both the assignor and the assignee. The request does not require the jury to assume that, if set up, they must have been set up for more than was due, but this is what the evidence of Rosenbury's statements and of the setting up of the notes for nine thousand dollars as stated by Hinman tended to show.

If, however, the bill states all the evidence upon the point of Wilbur's indebtedness to Rosenbury, it was the duty of the Court and jury to assume that there was not nine thousand dollars due on the notes, and that if set up as stated by Hinman the notes were set up for more than was due. It appeared from the plaintiff's own showing

Digitized by Google

(for the testimony of Wilbur on cross examination must be treated as evidence on the part of the plaintiff), that not more than one thousand dollars, if anything, was due. And so far as the bill shows, this fact was undisputed. If, therefore, the record shows all the evidence upon the point, the defendant, had he asked it, would have been entitled to a charge that the setting up of the notes as stated by Hinman, would, if found true, be strong evidence of fraud, whether the jury should find Rosenbury had made the statement in reference to Wilbur's indebtedness alluded to or not. We think, therefore, the defendant was entitled to the charge asked.

Did the charge given in answer to the request cure the error of its rejection? This charge was "that, if the jury find that plaintiff stated, before the assignment, that Wilbur was not indebted to any considerable extent; then, in deciding whether the transaction was fraudulent or not, they should take into consideration the fact that the plaintiff set up the notes as just claims in the assignment, *as well as all other facts* in the case." This charge certainly exhibits an extreme of delicate forbearance entirely uncalled for by the case, or the question of fraud involved: since, with apparently studious care, it avoids telling the jury that the setting up of the notes under the circumstances stated would be evidence of fraud, or whether its tendency would be to prove the transaction fair or fraudulent. Perhaps the charge may not violate any principle of law in any rule which it lays down. And the setting up the notes in the manner and to the amount supposed would so palpably indicate fraud, that a jury would not, under ordinary circumstances, be in any danger of misapprehending the effect of the evidence. But such a charge coming immediately upon the refusal of the Court to charge that such conduct would be evidence of fraud, was certainly calculated to make them doubt whether such

Digitized by Google

was its tendency, or whether in law it was to be regarded as having any decided tendency one way or the other.

It is further assigned as error, that the Court refused to charge, "that if the jury find that Wilbur was solvent, or believed himself to be so, when he made the assignment; then the necessary effect was to hinder, delay and defraud creditors, and the assignment is void."

We think this charge was properly refused. We can see no good reason to hold that the mere fact of the solvency or insolvency of the assignor, or his belief of the one or the other, must necessarily render the assignment void. *Without* any fraudulent intent in either case it would be valid: and *with* a fraudulent intent it would be void in both cases alike. Nor will the fact that the assignment is made by an embarrassed debtor, whether solvent or insolvent, to prevent a sacrifice of his property, necessarily, and of itself, render it void. It will depend upon the purpose with which the sacrifice is sought to be avoided. If for the sole purpose of giving his creditors the benefit of his property, which, in case of a sacrifice, they would not be likely to obtain to the same extent, then, whether solvent or insolvent, this is an honest purpose, and should not invalidate the assignment. But if the sacrifice is sought to be avoided for the purpose of enabling the assignor to reap a greater benefit by securing a larger surplus, or retaining the control or use of the property, or in any other way, or for the purpose of compelling a compromise; then the purpose is fraudulent, and the assignment is void. *See Ogden v. Peters*, 15 *Barb.* 560; *same case on appeal*, 21 *N. Y.* 23; *Rohenbaugh v Hubbel, cited*, 15 *Barb.* 560.

But the fact of the solvency or insolvency of the assignor, or his belief of the one or the other, may not be wholly immaterial. A person believing himself solvent might be more likely to seek to avoid a sacrifice for the purpose of securing a surplus to himself, than one who

Digitized by Google

believed himself to be insolvent, as the inducement to this end might perhaps be stronger: and therefore it might require less evidence in such a case to authorize the inference of such an intent, than if he believed himself insolvent. But this may admit of doubt.

The only remaining exception is, the refusal of the Court to charge "that the assignment conveys only a life estate in the real estate therein mentioned; and if the jury believe that Wilbur intended to reserve the remainder to himself, the assignment is void."

The assignment "grants, bargains, sells, releases, assigns and sets over to the said John J. Rosenbury, and to his assigns forever" (omitting the word heirs), all and singular the lands, tenements and hereditaments, real estate and chattels real (as well as his personal property, notes, accounts, &c). The habendum is, "to the said John J. Rosenbury, and to his assigns, in trust however, and to and for the uses, intents and purposes following: that is to say, the said John J. Rosenbury shall take possession of the said property, and shall with all convenient diligence, sell and dispose of the same, either at public or private sale, to such persons, &c., collect debts &c., and convert the same into money," &c. And it is further provided that said Rosenbury, with the avails and proceeds of said sales and collections, shall first pay and discharge the costs and expenses attending the due execution of this assignment, and the carrying into effect the said trusts, with a reasonable compensation for his own services: and the residue of the avails and proceeds of said sales and collections shall constitute a fund to be used and applied by said Rosenbury for and towards the payment of the debts owing by said Wilbur: which debts he shall pay and discharge in the order "therein set forth." Nothing is expressly reserved to the assignor except what may remain after the payment of all his debts of every kind. And the assignor covenants with the assignee "and his assigns,"

Digitized by Google

that "he will, when thereto required, make and cause to be made such further arrangements, deeds and conveyances as shall be necessary to carry into full effect this indenture, and the intention of the parties to the same."

This, therefore, is a conveyance *in trust for the sale* of the land and real estate (as well as of the personal property), and for the payment of debts from the proceeds. In such a case we do not think the word "heirs" is necessary to convey a fee. When a conveyance of land is made in trust for such a purpose, we think the trustee must be held to take an estate as large as may be necessary for the purposes of his trust, whether the conveyance contained words of inheritance or not:—2 *Washb. on Real Property*, *pp.* 186, 187, §§ 43 and 44; 4 *Kent*, 304; *Farquharson v. Eichelberger*, 15 *Md.* 63; *Spessard v. Rhorer*, 9 *Gill*, 261. There is certainly nothing in the instrument indicating an intent that the sale to be made by the assignee was to be of any particular estate or interest less than the whole. We are therefore satisfied that this request was properly refused. But for the several errors upon other points, the judgment must be reversed, with costs of this Court to the plaintiff in error; and a new trial must be granted.

MARTIN CH. J. and MANNING J. concurred.

CAMPBELL J. did not sit in this case.

Digitized by Google

APRIL TERM, 1864, AT DETROIT.

George French and another v. The Highway Commissioners of Springwells.

Misdirection of Certiorari.— Certiorari to highway commissioners to review action taken by them in laying out a highway, and which, on appeal to the township board, had been confirmed. Held, that the writ should have been directed to the township board, instead of to the commissioners.

Heard and decided April 9th.

Motion to quash a writ of certiorari.

The highway commissioners of Springwells took proceedings for laying out a highway, under a petition of freeholders, dated August 24th, 1863. A way having been ordered by them to be laid out, the plaintiffs in error appealed to the township board, by which the action of the commissioners was confirmed. The writ of certiorari was then sued out, directed to the highway commissioners.

E. Y. Swift, and *G. S. Swift*, for defendants in error, contended that the writ should have been directed to the township board; and that a decision as to the determination of the highway commissioners would be entirely nugatory, leaving the action of the township board in full force: — *Goodrich v. Commissioners, &c., of Lima*, 1 *Mich.* 385; *Ex parte Mayor of Albany*, 23 *Wend.* 276.

Digitized by Google

H. M. Cheever and *L. Bishop* contra, referred to 11 *Me.* 473; 35 *Me.* 373; 30 *Me.* 302; 26 *Me.* 406; 23 *Me.* 9; 37 *Me.* 558; 9 *Met.* 423; 6 *Cush.* 306; 8 *Pick.* 342; 12 *Cush.* 351; 3 *Harrison*, 179; 3 *Zab.* 383; 4 *Halst.* 18; *Ibid.* 21; 1 *Zab.* 87; 4 *Zab.* 736.

THE COURT held the point well taken, and the writ was quashed.

Pierre Teller v. Henry Willis.

Practice: Writ of error after two years.—A motion to dismiss is the proper form of objection to a writ of error in the Supreme Court supposed to be barred by lapse of time. The plaintiff in error may show himself, by affidavit, to come within the exceptions of the statute; and if that fact is disputed, the Court may resort to such measures as may be found most suitable to have the question settled.

Heard April 5th. Decided April 12th.

Motion to dismiss a writ of error issued more than two years after judgment rendered.

L. D. Dibble, for the motion, referred to *Comp. L.* § 5340; 11 *Wend.* 522; *Minor*, 57; 6 *H. & J.* 99; 4 *H. & J.* 215; 1 *Root*, 54; 11 *How.* 204.

G. Woodruff and *W. Gray* contra:

It is enough to answer this application that the fact objected is a proper subject of a plea: — 2 *Strange*, 837.

The statute which limits the time of issuing the writ, also provides certain exceptions to its operation, and which form appropriate subjects of replication to the plea.

A motion is founded on an irregularity or defect in the proceedings: — *Tidd Pr.* 512, 515.

Now it is not irregular to issue a writ of error after

Digitized by Google

two years. The process so issued is regular, and the clerk can not withold it from the party; and having issued and been returned, the court had jurisdiction:—2 *Strange*, 837; 4 *Mass.* 182; 1 *Root*, 54; 11 *Wend.* 524.

It cannot be assumed that we could not reply to the statute if pleaded, and we assert the contrary — and the Court will not allow our rights to be compromised by this motion.

CAMPBELL J.:

Where a writ of error is not brought until after two years from the date of judgment, we think it a more convenient practice, in a Court like ours, with no ready facilities for jury trials, not to require the defendant in error to plead the limitation, until there is some responsible showing that the plaintiff in error comes within some of the saving clauses. If upon a motion to dismiss for want of jurisdiction, made on the first reasonable opportunity, the plaintiff shows himself by affidavit to come within the exceptions, the Court can resort to such measures as may be found best, to have the question settled if disputed; while, if not disputed, no further delay will occur. We deem it our duty to discourage any practice which will render it necessary, before a hearing of the cause in error, to have a trial by jury of a preliminary issue, before another court, whose action upon such trial may itself be excepted to, — unless satisfied in advance that there is a real controversy, requiring such issue to be thus determined. We shall therefore regard a motion to dismiss as the proper form of objection, to a writ supposed to be barred by lapse of time.

The plaintiff in error having relied in good faith upon the English practice, which, for the reasons named, we do not deem adapted to the constitution of this Court, the motion will be regarded as continued until the last Tuesday of this month, to give him an opportunity of showing,

Digitized by Google

by affidavits, such facts as are claimed to exempt him from the operation of the statute.

The other Justices concurred.

On the day named, plaintiff in error not appearing, the case was dismissed. See same case, *post.*

Peter C. Caruthers v. Henry Humphrey and another.

Usury.—On the facts stated in the opinion, usury, as alleged, held to be established.

Nature of a mortgage of lands.—A mortgage is no longer, in this State, what it was originally at common law, a grant of the land to the mortgagee, defeasible upon condition subsequent, and to become absolute on failure to pay at the specified day. It is but a security for the debt. The estate in the land is still in the mortgagor; and payment at any time before foreclosure and sale, or—in case of foreclosure by advertisement—at any time before the expiration of the time of redemption, including legal costs, will discharge the mortgage; and no reconveyance is necessary.

Mortgage discharged by a tender.—And where the mortgagor, after the mortgage has become due, but before foreclosure, tendered to the holder the full amount due, which the latter refused to receive, it was held, in a suit subsequently brought to foreclose, that the tender discharged the lien of the mortgage, notwithstanding the money was not brought into Court, and it was not shown that the tender was kept good up to the time of hearing.

Heard January 6th and 7th. Decided April 15th.

Appeal in chancery from Shiawassee Circuit.

The facts, so far as they bear upon the legal questions, are stated in the opinion.

McCurdy & Raynale, for complainant, to the point that the lien of the mortgage was not discharged by the tender, cited, *Merritt v. Lambert*, 7 *Paige*, 344; *Post v. Arnot*, 2 *Denio*, 344; *Kortright v. Cady*, 23 *Barb.* 490.

Goulds & Hanchett, contra, referred to *Dougherty v. Randall*, 3 *Mich.* 581; *Baker v. Pierson*, 5 *Mich.* 456; *Cameron v. Irwin*, 5 *Hill*, 272; *Jackson v. Crafts*, 18 *Johns*, 110; *Kortright v. Cady*, 21 *N. Y.* 343.

Digitized by Google

CARUTHERS v. HUMPHREY.

CHRISTIANCY J:

The bill was filed to foreclose two mortgages (on the same land) executed by the defendants to William L. Coonley, both dated the 5th day of June, 1860; one for four hundred and twelve dollars and the other for two hundred dollars: both payable one year from date with interest at ten per cent. The former was assigned to complainant on the day of its date, and the latter on the 16th day of May, 1862, long after it became due. The mortgages were respectively accompanied by a promissory note for a like amount, payable in the same way, which notes were transferred to complainant with the respective mortgages.

The defense set up is usury, and a tender of the amount actually due, after default, and before the filing of the bill.

Before the execution of these mortgages, Coonley held a mortgage of the defendants, upon which there was due at the time of the execution of these mortgages about four hundred dollars, the last installment of which became due in January previous. In December 1859 Coonley wrote to Humphrey wishing to know if he could pay the mortgage, as he wished to build a house, but could not unless he should receive this money. Humphrey had previously talked with complainant about getting the money from him to pay this mortgage, and, after the receipt of this letter, went to see complainant, telling him of the receipt of the letter, and wishing to know if he could depend upon getting the money. Complainant told him he could write Coonley that the money should be forthcoming without fail. Humphrey asked him how much he was going to shave him on the money:—to which complainant replied he would let him have it at ten per cent, as they were old neighbors. Humphrey wrote Coonley accordingly, that he could rely upon the money. About the time the last

Digitized by Google

of this old mortgage became due (January, 1860), Humphrey again called on complainant for the money, who said he hadn't it then, but would have it in a short time. Coonley again wrote for the money, and Humphrey again went to see complainant, who still promised him the money, but had not got it yet. Coonley came out in March, but nothing could be effected, and he returned. In May, 1860, Coonley still pressing Humphrey for the money, the latter again called on complainant, telling him the facts, and that he had promised Coonley the money relying upon the promise of complainant. Complainant then told Humphrey he could not have it: there was no use being mealy mouthed about it: saying "you know I told you I would not shave you; but Coonley wants money pretty bad, and I can shave him now." Humphrey told him he could not shave Coonley, as whatever he took from him would come directly out of him (Humphrey), and that he would not allow Coonley to be shaved a cent, and asked complainant how much shave he wanted. Complainant said one hundred dollars and interest at ten per cent. Humphrey told complainant, if that was what he wanted, he would execute a mortgage to him and put the one hundred dollars in it, at ten per cent interest, and let Coonley have the money. Complainant replied he could not do that; as the mortgage from Humphrey to him, with that amount of shave in it, would be good for nothing. Complainant told Humphrey he could execute the mortgage to Coonley, and Coonley could assign it to complainant, and then there could be no advantage taken of it. Humphrey then asked complainant if the money would be forthcoming under *that* arrangement if he should write Coonley: to which complainant replied, it would be ready any day. Humphrey then wrote Coonley to come out, and he came on the fourth day of June, the two mortgages in question being executed on the next day.

Thus far there is no substantial disagreement in the

Digitized by Google

testimony: for, though complainant in his testimony says that "*in the purchase of the mortgage*" (meaning the $412 mortgage) he had "no negotiation with defendant Humphrey," this must be understood to refer to what took place between himself and Coonley in the actual transfer of the $412 mortgage, and not to the previous conversations or arrangements between himself and Humphrey in reference to the loan, and the mode of securing it: as complainant no where denies any one of the conversations or negotiations specifically stated by Humphrey as above set forth. His own interest, and the theory of a purchase from Coonley, independent of any arrangement with Humphrey, which he seeks to sustain by his own testimony, would naturally have prompted a specific denial of the conversations and agreement so distinctly stated by Humphrey, if these had not been true: and the neglect of complainant even to refer to them for the purpose of admission, denial or explanation, and his resort to such vague general language, which might be true whether the transaction were a purchase or a loan, give to his testimony an air of studied evasion, and excite a suspicion that he is carefully sticking to the shell, rather than giving the substance of the transaction.

The evidence in the case leaves no doubt, that the arrangement entered into on the fifth of June 1860, was, that Humphrey should execute his note, and that he and his wife should execute their mortgage to Coonley for the amount then due on the old mortgage, which we think did not exceed four hundred dollars (but which complainant obstinately insisted upon calling four hundred and twelve dollars) — that this mortgage should be made payable in one year, with ten per cent interest, that Coonley should assign this mortgage to complainant (with the note), for which complainant should advance and pay three hundred dollars. As this would leave a balance of one hundred dollars due to Coonley on account of the old mortgage,

Digitized by Google

and as Humphrey was in pressing need of seventy dollars, it was arranged between them that Coonley should let Humphrey have seventy dollars of the three hundred to be received from complainant, and that Humphrey and wife should execute to Coonley a further mortgage upon the same property for two hundred dollars, payable in one year, with ten per cent interest, and that this mortgage should not be recorded till after the four hundred and twelve dollar mortgage to be assigned to complainant. The two mortgages were given, and the larger assigned in pursuance of these arrangements, all on the same day. Thirty dollars of the two hundred dollar mortgage was clearly a bonus or "shave" as it was called: for though Coonley speaks of his expenses in coming out several times for the money, it is clear from his testimony, in connection with that of Humphrey, that this was but a pretext, to give plausibility to the transaction.

There is some conflict between the testimony of Humphrey and that of the complainant, as to how far Humphrey was a party to, and participated in, the arrangement for the transfer of the mortgage to complainant; and whether it was an independent and bona fide sale of the mortgage, by Coonley to complainant, or only a part of the arrangement for securing the loan previously agreed upon between Humphrey and the complainant, as well as upon the question whether complainant was, at the time, aware of the smaller mortgage given to Coonley, its consideration and amount. But we are entirely satisfied from the testimony of Humphrey, which is full, clear and consistent, as well as that of Coonley, who evidently desired to sustain the theory of a sale, and was a very unwilling witness in behalf of Humphrey, that all three of them participated in the arrangement in reference to the larger mortgage; that complainant and Humphrey were the principal parties to the arrangement, and that Coonley only participated so far as was necessary to carry out the

Digitized by Google

arrangement between them, by assigning the mortgage to complainant; that this arrangement was, in substance and effect, for a loan by complainant to Humphrey in pursuance of the verbal agreement previously existing between them; and that it was made to assume, upon paper, the guise of a sale to conceal the usury. And, so far as relates to the question of usury, the transaction, stripped of all disguise, was the same, in legal effect, as if the mortgage of four hundred and twelve dollars had been given by defendants to complainant for a loan of three hundred dollars only.

We are also satisfied from the evidence, that complainant, at the time of taking this mortgage, had full notice of and well understood the arrangement between Coonley and Humphrey in reference to the smaller mortgage given to Coonley; at least that he knew Humphrey was to execute the mortgage to Coonley to secure the one hundred dollars still due to him upon the old mortgage, and also to secure a portion of the three hundred dollars which Humphrey was to receive; though it is possible he may not have known that this latter sum was just seventy dollars, or that the thirty dollars was to be included in the mortgage as a bonus: but both these facts had been fully brought to his notice before he purchased this mortgage, which was long after it was due, and we are strongly inclined to think that he knew all the facts in reference to this mortgage, at the time of its execution; and there appears very clearly to have been an express understanding at the time, between complainant and Coonley, that this mortgage should not be recorded until after the four hundred and twelve dollar mortgage assigned to complainant.

The complainant, therefore, so far as relates to the defense of usury, stands in no better position than if both mortgages (and the accompanying notes) had been execu-

Digitized by Google

ted directly to him, and Coonley had never been concerned in the transaction.

But it is objected, *first*, that the answer does not expressly aver that complainant had actual notice of the usury; and *secondly*, that there is a variance between the allegation of usury and the proof.

We see no ground for either of these objections. The answer sets forth the whole transaction as to both mortgages, substantially as proved, and shows complainant's full knowledge of them at the time: and as to the larger mortgage, at least, shows complainant to have been directly an active and a principal party to the whole arrangement or agreement from which the usury necessarily resulted, and insisting upon that usury as an indispensable condition of the loan. An express allegation of notice would, in such case, be idle and superfluous. But independent of this, we think the allegations of notice would have been sufficient; as it is expressly alleged that complainant "well knew the consideration upon which both said mortgages and notes were given," also that, at the time of the execution of the smaller mortgage, complainant knew that thirty dollars was reserved and taken by Coonley as usury; also that "complainant had notice, before the assignment of said mortgages and notes to him, that in and by each of them, a greater rate of interest than is allowed by law had been reserved and taken, in manner aforesaid" (referring to the facts previously stated in the answer substantially as we have above stated them).

As to the second objection, it is urged that the usurious agreement is not proved as alleged, inasmuch as the allegation as to the larger mortgage, is, that the agreement was for one hundred and twelve dollars usury, whereas the proof shows that all the usury was put into the smaller mortgage: and, therefore, that the larger was not usurious. The fallacy of this position is too palpable to require comment.

Digitized by Google

The fact that the one hundred dollars (for the difference between this amount and the one hundred and twelve is not urged in this connection) was included in another mortgage to Coonley, as the balance still due him on his old mortgage, can in no way alter the fact that the four hundred and twelve dollar mortgage was given to secure a loan of three hundred dollars only — and the effect would have been the same whether this mortgage had been given or not, so long as Humphrey remained liable to Coonley for this amount, and so long as the fact remains that the complainant loaned and Humphrey received but three hundred dollars on his mortgage of four hundred and twelve.

This two hundred dollar mortgage was not originally given for complainant's benefit, but for Coonley's. Fifty dollars was paid upon it by Humphrey to Coonley, May 16th, 1862, and it was subsequently, on the same day, assigned to complainant.

It remains only to consider the effect of the tender.

It is clearly proved, and the fact is not disputed, that, on the 28th day of July, 1862, Humphrey tendered to complainant the full amount due on the two mortgages, exclusive of the bonus in each case, and the interest thereon — in other words, exclusive of what we have found to be usury. This tender was refused by complainant, and Humphrey, with full notice to complainant, deposited the money on the same day with a Mr. Simonson, near complainant's residence, to be paid to complainant when he should choose to receive it. But the money was not brought into Court, nor does it appear by the evidence that the tender was kept good up to the time of the hearing, though it is shown to have been still in Simonson's hands when the evidence was taken.

The naked question, therefore, is, whether the tender alone, made after default, or failure to pay on the day when due, had the effect to discharge the mortgages, or release the land from their incumbrance.

Digitized by Google

We think this question must be answered in the affirmative.

A mortgage is no longer in this State what it was originally at common law, a grant of the land to the mortgagee, defeasible upon condition subsequent, and to become absolute on failure to pay at the specified day. It is but a security for the debt. The estate in the land is still in the mortgagor: and payment at any time before foreclosure or sale, or (in case of foreclosure by advertisement) at any time before the expiration of the time of redemption — including, of course, any legal costs which may have been made — will discharge the mortgage in the same manner as if made on the day of payment mentioned in the mortgage; and no re-conveyance is necessary to vest the title in the mortgagor, in the one case more than the other.

The mortgage, therefore, is but a lien upon the land as security for the debt; and, so far as relates to the effect of a tender, we think this lien is precisely analogous to that of a lien upon, or a pledge of, goods as security for a debt. And in such case it is well settled that, while a tender of the amount due does not, without acceptance, extinguish the debt, nor release the debtor from personal liability, it extinguishes the lien, and the creditor loses his right to all collateral securities. *See Moynahan v. Moore*, 9 *Mich.* 9.

We have been saved the labor of a full discussion of this question, by the decision of the same question here involved by the Court of Appeals in New York, in *Kortright v. Cady*, 21 *N. Y.* 343. And in the able opinions of Davies and Comstock, Judges, given in that case, we fully concur.

We think, therefore, the lien of the mortgage was wholly discharged by the tender; and that complainant can look only to the personal responsibility of his debtor. And, this being a proceeding to foreclose — or, in other words,

Digitized by Google

to enforce the lien of the mortgages, the Court below was right in dismissing the bill, and the decree of that Court must be affirmed, with costs.

The other Justices concurred.

Judson C. Goodrich v. City of Detroit.

Liability of Detroit City for public works.—Under the charter of Detroit (of 1857) the city corporation has no power to make itself responsible for the price of any public work; and such work can only be paid for by funds actually in the hands of the city treasurer, provided for the specific purpose.

Case agreed upon: inferences of fact not to be drawn.—A case agreed upon by the parties, and submitted to the Court for its decision, is not a mere stipulation concerning evidence, from which inferences of fact may be drawn; but it is equivalent to a finding of facts by a Court, or the special verdict of a jury, in which every fact necessary to a recovery must be expressly found.

Where, therefore, a contractor claimed to recover of the city of Detroit the contract price of a certain public work, on the ground of negligence on the part of the city in collecting the assessment therefor, and a case was agreed upon and submitted to the Court which only set forth the steps which the city had taken for the collection; it was held, that the Court had no right, on such a case, to find the fact of negligence from the facts agreed upon and set forth.

Heard April 14th. Decided April 19th.

Case agreed upon by the parties, in the Wayne Circuit, as follows:

This is an action of assumpsit. The plaintiffs declare upon the common counts, and claim the sum of $5,000. The defendant pleads the general issue.

The facts of the matter in controversy are the following. In August, 1860, the plaintiffs entered into a contract with the defendant to do all the paving of the city for that year. The plaintiffs performed the contract in a satisfactory manner. The Common Council of said city assessed the taxes to pay for the paving thus done, in the usual manner.

Digitized by Google

William Cook was city collector of said city for the year 1860. He was appointed by the Common Council and gave the required bond to the city, with sureties.

The assessment roll made as prescribed, with a warrant in the usual form, was put by the city into the hands of said Cook.

On this warrant and assessment the said Cook collected the sum of $1,761, which he never paid over to the city treasurer, as provided by law.

The Common Council, in the fall of 1861, appointed a committee to examine into the accounts of the said Cook, then supposed to be a defaulter to the city, and this committee reported, October 1st, 1861, that the said Cook collected the sum mentioned, belonging to the paving fund, for the year 1860, with other sums belonging to other city funds, and recommended that the city sue said Cook and his bondsmen.

This recommendation was adopted by the Common Council, and suit commenced November 13th, 1861, by declaration. To this declaration a demurrer was put in on behalf of the defendants, January 2d, 1862. No further steps had been taken in the said suit up to the time this present suit was commenced.

It is stipulated by and between the said parties, that upon the foregoing facts and following, the said Circuit Court shall determine the questions of difference between them in this cause, and shall render judgment therein, according as the rights of the said parties in law may appear, in the same manner as if the facts aforesaid were proven upon the trial of said issue.

It is further stipulated between the said parties, that the charter and ordinances of the said city of Detroit may be used by either party on the hearing of this cause, without proof, so far as the same shall be admissible, and that portions given below, of the contract for said paving,

Digitized by Google

between plaintiffs and defendants, may be read as part of the evidence in this cause on the trial.

It is also admitted that the cause above mentioned, against Cook and his sureties, is on the docket, and duly noticed for hearing at the present term of this Court. And that the plaintiffs have demanded the amount due them in the manner required by law and the terms of said contract.

GRAY & O'FLYNN, *Attorneys for Defendant.*
WALKER & KENT, *Attorneys for Plaintiffs.*

The contract referred to in the foregoing is dated August 13th, 1860. The parties of the first part contract to do certain paving for the party of the second part. There are the following clauses.

"Payments for said work will be made from the proceeds of special assessments, made for that purpose upon each block paved, and not otherwise. And it is expressly understood and agreed, by and between the parties to this contract, that the parties of the first part shall not receive or demand payment for said work, until money for the payment of the same shall have been collected by the city collector, or such other person as shall be appointed by the Common Council for that purpose, and actually paid into the city treasury upon the special assessment rolls aforesaid. The said party of the second part undertaking only to use reasonable care and dispatch, in the preparation and collection of said special assessments, and the payment of the money proceeds thereof after collection and upon demand of the said parties of the first part."

On this case the Circuit Court rendered judgment for defendant.

Walker & Kent, for plaintiff:

1. The general character of the contract entered into between the city and plaintiffs is clearly set forth in

Digitized by Google

Beard v. The City of Brooklyn, 31 *Barb.* 143. The liability of the city is special. It promised to pay for the paving, not generally, but only in a particular way. Its duty was to assess, collect, and pay over the taxes raised for the special purpose of paying for the paving done. It was bound to use reasonable care and diligence in doing this work. For the absence of this reasonable care in any of its agents, it is responsible. If responsible at all, if the contract be in any way binding, it must be responsible for its agents, since being a corporation it can act only through agents: — *Story on Agency*, § 16.

2. Cook, the city collector, was the agent of the city in collecting the paving tax.

The city agreed by the terms of the contract to collect the money which was to pay for the paving. It could be collected only through an agent, and the intention must have been to collect it through the city collector, who must therefore be the agent of the city in the matter.

He cannot be considered the agent of the contractors. They had no control over him. He was in no way responsible to them. There was not the slightest legal connection between them.

Neither can the city collector be regarded as an independent public officer, according to *Lorillard v. Town of Monroe*, 11 *N. Y.* 392. He is wholly the creature of the corporation.

In Massachusetts, illegal taxes that have been collected can be recovered of the town or city authorizing the collection, without showing that the money has been paid into the treasury of the corporation: — 1 *Allen*, 319; 6 *Gray*, 131; 21 *Pick.* 64.

3. If Cook was the agent of the city, then clearly, when he collected the money the city collected it. Payment to an authorized agent is, in all its legal consequences, the same as payment to the principal.

The money thus received was collected to pay the

Digitized by Google

plaintiffs. The tax was assessed for this purpose. The city had no authority to receive the money, except for this.

The want of payment cannot be excused on the ground that the city has lost the money through the default of the collector. For all misfeasances of its agent, the city is liable: — *Story on Agency*, § 452. They are legally its misfeasances.

Two clauses of the contract will be urged against the views that have been presented.

The first is, "Payments for said work will be made from the proceeds of special assessments made for that purpose, upon each block paved, and not otherwise."

To this, we say, that it is for the proceeds of special assessments made as provided, that we sue. That the city has lost these proceeds through the carelessness of its agent; that is, through its own carelessness, can be no answer.

The second clause is, "And it is expressly understood and agreed by and between the parties to this contract, that the parties of the first part shall not receive or demand payment for said work, until money for the payment of the same shall have been collected by the city collector, or such other person as shall be appointed by the Common Council for that purpose, and actually paid into the city treasury upon the special assessment rolls aforesaid."

We think the true view of this is: It was inserted merely to fix, as the time when the contractors would become entitled to their pay, the point when the money would, in the ordinary course, be received into the city treasury.

The city would not agree to pay it as soon as collected, because the collector is not obliged to make a return as soon as he has collected any money. His warrant gives

Digitized by Google

him a certain number of days before he is obliged to report and pay over the amount collected.

The city promised to pay the contractors as soon as the money was received into the treasury, where the proper officer could pay it, just as an administrator may promise to pay money out of an estate when collected.

We do not think it can be successfully maintained that the clause in question should be interpreted to make the contractors liable for the default of the city collector.

That such was not the intention is conclusively shown by the fact, that the city undertook "to use reasonable care and dispatch in the preparation and collection of said special assessment, and the payment of the money proceeds thereof after collection."

The "reasonable care and dispatch" the city promised must in part be that of the collector. He was to collect the money, and if any care was to be used in the collection, it must be his care.

4. If it were admitted that the city is not responsible for Cook's default, it was bound to use reasonable diligence in prosecuting his sureties. This it has not done: —31 *Barb.* 152; 1 *Metc.* (*Ky.*) 339.

W. Gray for the city:

Defendant claims there is no liability under the contract, as the money has not been paid into the treasury. The action can be maintained only for negligence in causing the money to be collected and paid over. Whether there was such negligence or not, is a question of fact passed upon by the Court below, upon the evidence, and the conclusion come to cannot be reviewed. But even if it could be, the finding was correct. The duty of defendant is specially limited to "use reasonable care and dispatch in the preparation and collection of the assessments," etc. All this has been done. But is was claimed

Digitized by Google

the suit on the collector's bond was not vigorously prosecuted.

This is no proof of negligence on the part of defendant. It could not prosecute the suit. It could only place it in the charge of a suitable and competent attorney, and leave its management and conduct to him. There is no evidence that the attorney was not a suitable one; no evidence that the delay in bringing the cause to a hearing arose from negligence; no evidence as to the nature of the demurrer or extent of preparation necessary.

The extremest duty of the city was performed by placing the claim in the hands of a proper agent for suit. It could not be expected to attend the courts, or even understand what might or should be done. Its attention was not called to any undue delay by plaintiffs, or any other person.

The attorney of the corporation is elected, not appointed, to defend and prosecute all suits by or against the corporation. And the corporation are not liable for his neglect: — 1 *Hill*, 545, 550.

Aliter, if the duty is imposed absolutely upon the corporation as such: — *Ibid*; *Onderdonk v. Brooklyn*, 31 *Barb.* 506–7.

The case of *Beard v. Brooklyn*, 31 *Barb.* 143, is relied upon — but the negligence there complained of was the negligence of the council. No warrant was issued.

The plaintiff in this case declares only upon the common counts. If there is any case against the city, it is one of a special action on the case for negligence: — 23 *Wend.* 458–60; 4 *Denio*, 520–25; 31 *Barb.* 148–9, 153.

We also claim that the proper remedy is by mandamus: — 23 *Wend.* 458.

This is more particularly applicable under the charter of the city of Detroit. All the revenues of the city are divided into separate funds. Street paving fund is one. No contract shall be let, paid, or contracted to be pa'd

Digitized by Google

for, save out of the proceeds of the assessment levied for that purpose. Charter, p. 89, § 11.

Under this provision, the city cannot pay till the assessment is collected and paid in. Contracting parties are bound by this, and their only remedy is by mandamus to compel the collection. The Court will not adjudge that the city must do an illegal act, *i. e.*, pay this out of some other fund. The general fund can not be touched to pay what is provided for by a special fund.

CAMPBELL J.:

This case comes up for the review of a judgment rendered by the Wayne Circuit Court, upon an agreed statement of facts.

Plaintiffs agreed with the city of Detroit to do certain paving. The contract contained the following clauses: "Payments for said work will be made from the proceeds of special assessments, made for that purpose upon each block paved, and not otherwise. And it is expressly understood and agreed, by and between the parties to this contract, that the parties of the first part shall not receive or demand payment for said work, until money for the payment of the same *shall have been collected by the city collector*, or such other person as shall be appointed by the Common Council for that purpose, and *actually paid into the city treasury* upon the special assessment rolls aforesaid. The said party of the second part undertakes *only to use reasonable care and dispatch*, in the preparation and collection of said special assessments, and the payment of the money proceeds thereof after collection, and upon demand of the said parties of the first part."

Assessments were duly made, and placed in the hands of the Collector, who collected $1,761.43, and failed to pay it over. October 1st, 1861, a committee of the council reported him as a defaulter, and suit was brought on his bonds November 13th, 1861. A demurrer was put in to

Digitized by Google

the declaration January 2d, 1862. No further steps had been taken when the present suit was commenced, May, 1863.

The first question that arises, is, whether the city is liable directly on the contract, the money having been received by the collector.

The charter of the city provides that no public work shall be contracted for or commenced until an assessment has been levied to defray the expense, and no such work shall be paid or contracted to be paid for, except out of the proceeds of the tax or assessment thus levied. *P.* 89, § 11, *City Charter.* The treasurer is required to have custody of all moneys, and keep each fund separate, and pay no warrant against any fund unless he has money belonging to it. And moneys can only be paid upon a warrant specifying the particular fund on which it is drawn. *P.* 28, § 10.

It is manifest from these, and other clauses of a similar purport, that the city corporation has no power to make itself responsible for the price of any public work. Such work can only be paid for by funds actually in the hands of the city treasurer, provided for the specific purpose. The contract recognizes this, and expressly provides that the contractors shall receive no payment until the money shall not only have been collected, but actually paid into the treasury. And it further provides, that the city shall only be bound to use reasonable care and dispatch, in the collection and payment. The contractors, in other words, recognizing the ordinary method provided by law for raising the fund, agree to look to that, and to that only. We are clearly of opinion that the city was not, under the agreement, bound to account for the money, until placed in the hands of the treasurer.

But it is claimed that there is a liability for neglecting to enforce with diligence the official bond of the collector, to compel a restoration of the money received

Digitized by Google

by him and not accounted for. Waiving the question whether, under the common counts in assumpsit, such a cause of action can be supported, and the further question when mandamus will lie, we think no such neglect is made out. The case agreed upon finds that the city commenced suit, that the declaration was demurred to, and that no further steps have been taken. As the law requires suits to be under the charge of certain officers designated, there can be no negligence in putting the case in their hands. How far the city could then go in expediting matters, or in remedying delays in the course of the suit, is not a question of law, but must depend upon some showing; and if there has been any default or neglect, it must be agreed upon, or else proven by evidence. The case before us is one in which the parties, waiving the production of any evidence, have declared what facts are to be assumed as true. No fact not set forth in the case can be thus taken. It was claimed on the argument that this agreed case is open to any inferences of fact which might be allowed to be drawn from evidence, and that negligence might be so inferred. We are not prepared to hold that, from the simple facts before us, if shown by proof in the usual way, any such inference would be justifiable. But the point is not material, for we are of opinion that such an agreed case is equivalent to a finding of facts by a court, or the special verdict of a jury, in which every fact necessary to a recovery must be expressly found. It could never have been the intent of the statute to provide expressly for a mere stipulation concerning evidence, which should allow the Court to draw inferences from inconclusive facts, without the power of removing doubts by further proof. Still less could it have designed to forbid a jury — (which is the most appropriate body to draw inferences of fact)—from determining what facts are to be inferred from the proof, when the right of trial by jury has been so jealously preserved. The

Digitized by Google

refusal of a jury, and the provisions requiring the Circuit Court to give judgment on the case agreed upon, and the provisions allowing the Supreme Court, without any assignment of error, to correct any alleged errors in the judgment below, all point to the same conclusion, and negative the idea that the facts agreed upon can be treated in any other way than as a special finding. See *Comp. L.* §§ 3421, 4346.

We think the judgment below should be affirmed, with costs.

MANNING and CHRISTIANCY JJ. concurred.

MARTIN CH. J. did not sit in this case.

Charles G. Rowe v. James G. Wright.

Parol evidence to show terms of sale where a written instrument exists. — An instrument in the following form:

"J. G. W., bought of C. G. R.,
1862, March 24, 1 frame building," &c.

"Received payment, $419, C. G. R.," is not conclusive of the terms and conditions of the sale, and does not exclude parol evidence to show that the property mentioned was not to be delivered till paid for in the manner verbally agreed upon at the time of sale.

Heard April 12th and 13th. Decided April 19th.

Error to Calhoun Circuit.

The action was replevin. Defendant claimed the property under an instrument in the following form:

"James G. Wright, bought of Charles G. Rowe; 1862, March 24, 1 frame building, . . . $300
1 marble slab, (&c., &c.)
Received payment, $419 CHARLES G. ROWE."

The plaintiff gave evidence tending to show that this instrument was executed while he was in possession of the property, and upon the agreement and express understand-

Digitized by Google

ing that he should keep possession of the property until the defendant should assume three certain debts owing by the plaintiff's father, amounting in the aggregate to $383 or thereabouts, and that defendant had assumed or paid but one of them.

The Circuit Judge charged the jury, that the bill of sale, in the absence of any testimony to impair its effect, would have shown a transfer of the title, as it imported a sale of plaintiff's interest. That the plaintiff had urged that this did not embody all the arrangements, and that it was understood that neither the paper nor the property was to be delivered until something else should be done, viz: the assumption of certain debts by Wright. That it was competent for plaintiff to show what the consideration was, but not to contradict the legal effect of the instrument. That as it was not pretended there was any fraud, that by some prior or cotemporaneous verbal understanding, the plaintiff was not authorized to show that the property was not to be delivered till the happening of some event, as this would be inconsistent with the legal effect of the transfer of the instrument in writing, which was delivered as the evidence. To this charge the plaintiff excepted.

The defendant recovered judgment in the court below.

W. H. Brown, for plaintiff in error:

A receipted bill of parcels need not be produced to prove a sale; parol evidence is competent, on the ground that such paper generally amounts to nothing more than a receipt for the price:—2 *Denio*, 638; 7 *Cow.* 334; 8 *Pick.* 552; 5 *Johns.* 72. Nor does a bill of sale embody the preliminaries or the essential terms of the contract in such a way as to exclude parol evidence:—*Picard v. McCormick*, 11 *Mich.* 76.

Digitized by Google

C. I. Walker, for defendant in error:

The rule excluding parol evidence to contradict or vary the terms of a written instrument is applicable to bills of sale, unless there is fraud in the case: — 2 *Stark. Ev.* 6 *Am. Ed.* 550; 2 *Phil. Ev. by Edwards*, 667; 9 *Met.* 87; 3 *T. R.* 413; 1 *Johns.* 414; 9 *Vt.* 285; 15 *Ala.* 317; 12 *Met.* 353; 1 *Wend.* 432; 1 *Dev. & Bat.* 250; 24 *Vt.* 55; 29 *Ala.* 283; 3 *Camp.* 426. *Picard v. McCormick*, 11 *Mich.* 76, was a case of fraud.

CHRISTIANCY J.:

We think the Court below erred in holding the written instrument in question conclusive of the terms and conditions of the sale, and in excluding from the jury the verbal evidence tending to show that the property was not to be delivered till paid for in the manner verbally agreed upon at the time of the sale.

The written instrument was rather a bill of parcels than a bill of sale — little if anything more in substance than a receipt for the price, and subject to the same rules as to the admission of verbal evidence to vary, contradict or explain it. It does not of itself purport to be a conveyance or contract, but is more in the nature of a mere acknowledgment of facts which had already occurred without its aid. It was therefore as much open to contradiction or explanation by verbal testimony, as if the same facts had been proved by verbal testimony: — *Tobey v. Barber*, 5 *Johns.* 68; *Southwick v. Hayden*, 7 *Cow.* 334; *Blood v. Harrington*, 8 *Pick.* 552; *Dunn v. Hewitt*, 2 *Denio*, 637; 1 *Phil. Ev. by Cowen, Hill and Edwards*, *p.* 587, *note* 171; *Ibid. vol.* 2 *p.* 672, *note* 494.

In *Hazard v. Loring*, 10 *Cush.* 267, the bill of parcels was precisely the same, both in form and substance, as that in the present case. The plaintiffs offered verbal evidence to prove that the transfer was a pledge and not

Digitized by Google

an absolute sale, and that the defendant at the time orally agreed to return the goods upon being paid the amount advanced and certain charges. The Court say, "The rule that parol evidence is not admissible to vary, explain or control a written contract, is not applicable to mere bills of parcels made in the usual form, in which nothing appears but the names of the vendor and vendee, the articles purchased, prices affixed, and a receipt for payment. These form an exception to the general rule of evidence, being informal documents intended only to specify prices, quantities and receipt of payment, and not designed or intended to set out the terms and conditions of a contract of bargain and sale. They are in the nature of receipts, and always open to evidence which proves the real terms upon which the agreement of sale was made."

In this view of the law, we entirely concur. We think, therefore, the Court should have permitted the jury to take into consideration all the evidence tending to show the real nature of the whole transaction. The judgment must be reversed, with costs, and a new trial granted.

The other Justices concurred.

Joseph Gard v. James E. Stevens.

Guaranty, when continuing.—The following was held not to be a continuing guaranty, but to be limited to a single purchase or transaction: "St. Joseph, Sept. 18th, 1858. Joseph Gard, Dear Sir: If you will let the bearer have what leather he wants, and charge the same to himself, I will see that you have your pay in a reasonable length of time. J. E. Stevens."

Guaranty: application of payments.—Held further, that the first moneys afterwards received by the creditor on the debtor's general account, should be applied in payment of the leather sold on the guaranty.

Practice: Cases made.—Where a case is made after judgment in the Circuit Court for a review on both the law and the facts, it is presumed to contain all of the evidence, unless there is something on the face of the case itself indicating the contrary.

Heard April 6th, and 7th. Decided April 19th.

Digitized by Google

GARD v. STEVENS.

Case made after judgment, from Berrien Circuit. The facts sufficiently appear by the opinion.

C. I. Walker, for plaintiff:

1. The case does not show that *all* the evidence that was given on the trial is embodied therein, and this must be affirmatively shown, or no questions of fact can be considered: — *King v. Moore*, 10 *Mich.* 544; *Gaines v. Betts*, 2 *Doug.* 100.

2. As to the proper rules, applicable to the interpretation of guaranties, courts have greatly differed. The decisions may, perhaps, be classified as follows:

1st. Those that hold that guaranties are to be construed with great strictness, and in favor of the guarantor, the contract being to pay the debt of another, and not his own: — 2 *Pars. on Cont.* 21, *note*; 1 *Cromp. & Mees.* 48; 3 *B. & Ald.* 593.

2d. Those that hold that, inasmuch as guaranties are usually in the words selected by the guarantor, upon which the creditor has acted, they are to be taken as strongly against the guarantor as the words will admit: —12 *East*, 227; 6 *M. & W.* 606; 12 *Wheat.* 518; 7 *Pet.* 122; 5 *Conn.* 151.

3d. Those that hold that that effect shall be given to the instrument, which will best accord with the intention of the parties, as manifested by its terms, taken in connection with the subject matter and the surrounding circumstances, neither enlarging the words beyond their natural import to favor the creditor, nor restricting them to aid the guarantor: — 2 *Pars. on Cont.* 21, *note*; 22 *Pick.* 228; 17 *Wend.* 424; 24 *Me.* 64; 3 *Kern.* 232.

We think this last the better rule. Still the application of it is not without its difficulties, for often a guaranty is so ambiguously worded that it is capable of two fair interpretations. In such case the rule is well expressed

Digitized by Google

by Judge Story, that, where the creditor has advanced his money on the faith of the interpretation most favorable to his rights, that interpretation will prevail in his avor; for it does not lie in the mouth of the guarantor to say that he may, without peril, scatter ambiguous words, by which the other party is misled to his injury:—2 *How.* 450; 2 *Camp.* 413; 1 *Pars. on Cont.* 508, *note.*

Applying these two last rules of interpretation to this contract as viewed in the light of surrounding circumstances, we think there can be no question as to its proper construction.

It is quite clear, that if there had been a limitation as to the amount for which the defendant became guarantor, this would, under the authorities, be held a continuing guaranty. In other words, leather might have been delivered thereon from time to time:— 1 *Pars. on Cont.* 508, *notes*; 3 *Camp.* 220; 12 *East*, 227; 5 *Conn.* 149.

There are two cases, which, if law, seem to establish the position that where the guaranty is unlimited as to amount, it will be construed as limited in its effect to a single transaction:—*Rogers v. Warner*, 8 *Johns.* 119; *Whitney v. Groot*, 24 *Wend.* 84.

The case of Rogers v. Warner was well decided upon another ground. It was a "*Per Curiam*" decision, and seems to have been little considered.

Whitney v. Groot followed that decision, but the Chief Justice especially relied upon the vicious rule of strict construction as applicable to guaranties.

The reasoning suggested, rather than adopted, in the 8 Johns., that because the guaranty is unlimited in *amount*, it is *therefore* to be limited to a *single* transaction, is too absurd to need refutation. The guarantor, by such an unlimited guaranty, expresses the highest possible confidence in the person whose debt or purchases he thus guarantees. And that unlimited confidence, would, of

Digitized by Google

itself, lead the creditor to give a liberal interpretation to the instrument.

These cases in New York seem to stand alone, and are at variance with Allen v. Pike, 3 Cush. 238, and with all proper rules of interpretation.

G. V. N. Lothrop for defendant:

The guaranty was not continuous. It was terminated with the first delivery: — *Rogers v. Warner*, 8 *Johns*, 119; *Whitney v. Groot*, 24 *Wend.* 84; *Fellows v. Prentiss*, 3 *Denio*, 512; *White v. Reed*, 15 *Conn.* 457; *Cremer v. Higginson*, 1 *Mason*, 323.

Courts have differed widely as to the rules of construction to be applied to guaranties. Which of these rules is best sustained, either by reason or authority, seems immaterial in this case. By no fair construction, I think, can an intention be deduced that Stevens intended to have a running account opened. There are no words which indicate that new credits were to be given from time to time. The natural and obvious meaning is, "Give Gates what he now wants, and I will pay you if he don't."

If the guaranty was not continuous, then Stevens was liable only for the first purchase. This was paid; for the payments made by Gates exceed the amount of the first purchase, and the law will apply these payments to extinguish the first items of the account, especially in favor of a surety: — 2 *Pars. on Cont.* 145; 1 *Am. Lead. Cases*, 298–9; 10 *Conn.* 183.

MANNING J.:

The action is assumpsit for the price of leather sold to one Gates, on the following guaranty:

"ST. JOSEPH, Sept. 18, 1858.

JOSEPH GARD, *Dear Sir:*

If you will let the bearer have what leather he wants,

Digitized by Google

and charge the same to himself, I will see that you have your pay in a reasonable length of time. Yours, &c.,

J. E. STEVENS."

As plaintiff sold leather to Gates at several different times, and for different amounts, the first question is whether the guaranty is limited as to time. We think it limited to a single purchase or transaction. We must hold this, or that it is unlimited both as to time and amount. Every person is supposed to have some regard to his own interest; and it is not reasonable to presume any man of ordinary prudence would become surety for another without limitation as to time or amount, unless he has done so in express terms, or by clear implication. If the guaranty was limited in express terms, either as to time or amount, but not as to both, it might be said it was the intention of the guarantor to leave it open as to the other, or that a further limitation could not be implied. But where it contains no express limitation as to either, and there is nothing in the instrument itself from which it can be inferred that it was the intention of the guarantor to leave it open as to both, we think it must be understood as referring to a single transaction. The case of *Rogers v. Warner*, 8 *Johns.* 119, and *Whitney v. Groot*, 24 *Wend.* 81, we think are correct in principle, and not in conflict with any of the cases cited on the argument by plaintiff's counsel.

We are further of opinion that the first moneys afterwards received by plaintiff on Gates's general account should be applied in payment of the leather sold on the guaranty.

It was objected on [the argument that it does not appear from the case that it contains all the evidence. That is, as we understand the objection, that it is not so stated in the case itself. It is not necessary that it should be. When a case is made for review of both law and facts, it is presumed to contain all of the evidence, unless

Digitized by Google

there is something on the face of the case itself indicating the contrary.

The judgment below must be reversed, and a judgment be entered for defendant, with the costs of both Courts.

MARTIN CH. J. and CAMPBELL J. concurred.

CHRISTIANCY J. did not sit in this case.

Nelson Roberts v. Cyrus Miles and others.

Effect of answer in chancery as evidence: examination of defendant as a witness. Where an answer in chancery is called for on oath, and the defendant of his own knowledge fully and fairly negatives any allegation of the bill, complainant can have no relief depending upon that allegation, unless the answer is overcome by more than the equally full testimony of one witness.

But this rule amounts simply to this: that there can be no decree in favor of complainant unless the evidence preponderates in his favor; and that where answer and opposing witness are equally fair and explicit, there can be no such preponderance.

If defendant, after having thus answered, is called upon the stand as a witness under the statute of 1861 (p. 168), and furnishes the means of destroying his own answer, and corroborating complainant's case, his testimony on the oral examination and cross-examination is preferable to his answer.

Since said statute the defendant's answer on oath, responsive to the bill, is to be regarded as of the same force only which it would have were it the defendant's deposition as a witness.

Defense precluded by judgment.—Where one is induced to become indorser of a note by the statements of the payee that it is mere matter of form, and he will not be troubled about it, and afterwards suit is brought on the note, and he makes no defense, and judgment is obtained, he is thereafter precluded from claiming that the judgment is not binding upon him.

Indorser discharged by conduct of holder.—But where, after the judgment, statements to a similar effect were made, under such circumstances as to justify the indorser in believing and acting upon them, and in supposing he was not liable, and he was thereby induced to abstain from securing himself when he might easily have done so, until the maker became insolvent, and an execution was then levied upon his property, it was held that he was entitled to a perpetual injunction.

Heard January 7th and 8th. Decided April 19th.

Digitized by Google

ROBERTS v. MILES.

Appeal in chancery from St. Clair Circuit. The facts are stated in the opinion.

Crellin & Atkinson and *A. B. Maynard*, for complainant:

1. The assignment to Miller, as affecting Roberts, is the same as if made to Miles & Co. If he, being a member of the firm, accepts securities for the payment of a debt due to them, but applies them to a different purpose, Roberts in equity and justice should be discharged.

2. Putting the claim into judgment does not affect the equitable rights of Roberts to be discharged therefrom:—2 *Lead. Cas. in Eq.* 566, 567 *and cases cited.*

3. It is well settled that if a creditor surrenders up or releases any sureties of the principal, whether acquired by proceedings instituted against him, or voluntarily placed in his hands, then, to the value of such securities, the surety is discharged. The same result would follow if a wrongful application should be made:—8 *S. & R.* 453; 8 *Pick.* 121; 2 *Amer. Lead. Cas.* 343.

Whatever funds came into the hands of Miller, as such assignee, to be applied in payment of the individual debts of Bailey and Bancroft to Cyrus Miles & Co., should have been applied equally on their several indebtedness, and no different application could properly be made without the consent of both Bailey and Roberts. Upon every principle of equity and justice, Roberts should be discharged from the judgment, to the extent, at least, of the monies which Miller should have paid thereon.

4. Roberts evidently placed full confidence in the statement of Miles, that the judgment was satisfied. After that he took no measures for his own protection, though Bailey had then, and for some time afterwards, personal property subject to levy, sufficient to have satisfied the judgment. This, we claim, discharges Roberts, and whether the judgment was paid or not, is of no importance, as

Digitized by Google

the defendants are equitably estopped from disputing its payment:—9 *Met.* 511, 517; 21 *Pick.* 195; 12 *Met.* 545; 7 *Hill*, 250; 9 *Met.* 511.

5. The $1500 note given by Bailey to Miller, secured by a chattel mortgage on his furniture, was several months after the assignment had been made, and after one of the defendants had repeatedly assured Roberts that they should not look to him, and that the judgment was satisfied. Whether taken to secure the payment of the judgment, or to aid Bailey in defrauding his creditors, is immaterial, as affecting the rights of Roberts. No one would claim in a court of equity that a creditor could aid his debtor in covering up his property, in this manner, without discharging the surety. He can not, wilfully, shift the burden of a debt from the property of his principal debtor, and impose it on the surety.

A. E. Chadwick and *W. T. Mitchell*, for defendants:

All the material allegations of the bill are distinctly and definitely denied by the answer, and the complainant has failed to meet these denials by sufficient proof. In no case has he met a denial by the testimony of two witnesses; and in points where the complainant's testimony is added to Bailey's, the defendants have counterbalanced the testimony so as to leave the allegations of the bill unsupported by prepondering testimony.

When the facts stated in the complainant's bill are denied in the answer, it is a general principle that they must be proved by two credible witnesses, or one witness and strong corroborating circumstances:—*Adams Eq.* 21; 6 *Johns.* 522; *Story's Eq. Juris.* § 1528.

Complainant not having charged that the judgment sought to be avoided, was obtained by fraud, mistake or surprise, is estopped from proof of such fact. It is then clear that complainant is estopped from going into matters arising before the judgment; and by his default he waived

Digitized by Google

all legal and equitable rights, even had he covered such matter by his bill.

A court of equity will not enjoin a party from pursuing a judgment at law, upon any ground which afforded a defense at law, unless he shows some good reason for not making the defense; as that he was prevented by accident, surprise or mistake, or by the fraud of the opposite party, without his own fault or neglect:—13 *Vt.* 477; 1 *Johns. Ch.* 465; 1 *Johns. Ch.* 49.

Roberts is not released by any act of defendants since the judgment. It is not shown that time was given to Bailey, and complainant has not been deprived of any right of recourse to Bailey, nor has there been any misappropriation of moneys which he was entitled to have applied on the judgment. The proofs in regard to the chattel mortgage are immaterial, as there is no charge in the bill concerning it. The facts stated in a bill in equity constitute the sole ground of relief:—7 *Conn.* 496; 1 *Bland*, 236; 2 *Bland*, 45; 2 *Ired. Ch.* 575; 3 *Swanst.* 472; 6 *Price*, 240; 18 *Ves.* 302; 11 *Wheat.* 103; 11 *Pet.* 229; 7 *Vt.* 229; 15 *Vt.* 110.

As indorser, Roberts did not stand in the relation of a surety. There is a broad distinction between them. And to the extent of this distinction, complainant's allegations are wide of the issue. When the indorser has notice of dishonor, he is bound to pay at once. Mere indulgence or passiveness on the part of the holder can not impair his right. The demand may, at the option of the holder, be enforced against the indorser separately.

CAMPBELL J.:

The bill in this case was filed to restrain the sale of property under execution.

Defendants hold a judgment against complainant as indorser, he being sued jointly with Mark T. Bailey the maker of a promissory note indorsed for Bailey's accom-

Digitized by Google

modation, and the judgment being against both, and rendered July 6, 1859.

The facts show that when the note was indorsed, Roberts, who was an illiterate man, was assured by Miles (the partner in a bank consisting of all the defendants) that the indorsement was a mere form, and that complainant should never receive any trouble about it. No defense, however, was interposed in the suit at law.

July 14, 1859, an execution was issued on this judgment, but no attempt appears to have been made to serve it. In August an assignment was made by Bailey and his partner, W. L. Bancroft, to Miller, providing among other things for the payment of all claims held against them or either of them by defendants. Bailey and Bancroft were to be at liberty to draw $1000 for individual purposes.

There was during the season of 1859 a sum of money, which is testified to as $1000 or $1500, held by the bank belonging to Bailey and Bancroft, of which Bailey directed Miles to credit one half on this judgment, which he promised to do, but afterwards credited all upon debts of Bancroft.

After the assignment, and in August, Miles swears he told complainant that the debt was fully secured by the assignment, and that he would, or probably would, never be troubled about it. In October, 1859, complainant testifies that Miles told him it was settled by money on hand. Bailey testifies Miles told Roberts it was all got along with.

November 16, 1859, Bailey executed to Miller, without any new consideration, a chattel mortgage for $1500, payable in one year. This does not appear to have been a bona fide transaction, but the mortgage was subsequently claimed by Miles and Miller as security for the judgment. The mortgage was on Bailey's furniture, which was of its full value. The furniture was afterwards secreted, and

Digitized by Google

Miller claimed under oath that he had been defrauded by the removal. He held no other claim against Bailey except the judgment.

In March, 1860, an execution having been issued on the judgment, and levied on complainant's property, Roberts applied to Miles, who released it, saying the execution was issued against both because the judgment was against both, but that he did not intend to have complainant's property levied on, and that the levy was a mistake of the sheriff.

In October, 1861, the levy sought to be enjoined was made on property belonging to complainant. No application is shown by any one to have ever been made to complainant for payment. In June, 1861, as appears from Mr. Crellin's testimony, Miller said to him that he supposed Roberts was not liable. This was while proceedings were going on against Bailey for the fraudulent secretion of the mortgaged chattels, which were then claimed as security for this judgment. Eddison's testimony is to the effect that defendants claimed the chattel mortgage as security for this debt.

It is claimed by complainant, as one ground of relief, that time was given by this chattel mortgage, and that this operated as an independent ground of discharge. The objection of the defendant's counsel to this ground of relief is well taken. The proofs do not come up to the allegations. It is very clear that the attempt to hold this mortgage as a security for the judgment was an afterthought of defendants, and that it at first was taken by Miller as an assistant to Bailey in putting the property out of the reach of his creditors. But while this specific ground of relief fails, the facts connected with the mortgage are admissible, so far as they tend to explain the other transactions.

The principal ground of relief set up is, that Roberts has been uniformly assured that no liability would be

Digitized by Google

enforced against him, and under such circumstances as would dissuade him from securing himself against loss, which the evidence shows he might easily have done by means of Bailey's furniture before it was mortgaged to Miller; and further, that defendants, when they had out an execution, and knew Bailey had ample property to be levied on, did not make any such levy. It is also claimed that, by the receipt of money which was not applied as directed by Bailey, defendants were actually paid or nearly paid.

The bill calling for an answer under oath, defendants denied most of the charges by following *verbatim* the language of the complainant. The answer was not excepted to, but, in considering its value as a piece of testimony, it is to be observed that the object of a discovery is to be informed touching the entire transaction referred to, and a literal denial which does not deny that the charge may after all be substantially true, is in many cases a mere evasion. *Story's Eq. Pl.* § 852; *Mitf. Eq. Pl.* 309, 310; 2 *Dan. Ch. Pr.* 833, 834, 835 *and notes* (*Perkins's Ed*). In chancery, as at law, a case is made out by proof of the substance of an allegation, and if such an answer is to be allowed the usual weight, so far as it goes, it cannot fairly be made to extend beyond its strict language.

The proof that after the assignment from Bailey and Bancroft to Miller, Miles informed Roberts that it was settled by *money on hand*, is only made by Roberts, and Miles denies it. But Bailey swears Miles told Roberts that "*he might rest easy, for that matter of Bailey's was all got along with.*" And Miles when swearing on his own behalf admits he may have told him that he would not be troubled about it.

The real question involved here, is, whether Miles induced Roberts to believe that he was no longer liable on the judgment. Regarding these statements of the three

Digitized by Google

deponents as we should be allowed to in the absence of any technical rules, we could not hesitate in determining that Roberts was so persuaded by Miles, and that Miles meant to give him such an impression. And if we are at liberty to consider the testimony concerning the original indorsement, we should be equally convinced that Roberts was induced by Miles, and not by Bailey, to make the indorsement, and that he had been led to believe that no liability would ever be enforced against him, and was therefore the more easily justified in accepting Miles's further statements touching his discharge. And if we look to the still subsequent release of his horses when levied on, and the explanation and apology of Miles, it is difficult to imagine how Roberts could have doubted of his own immunity. But we are called upon to hold that, in spite of the convincing character of this testimony, it must be disregarded upon fixed rules of equity practice. As this is the first case since our statutes have been changed in which any question has arisen concerning the supposed arbitrary value of testimony in equity, we deem it proper to consider the matter more fully than we should otherwise feel justified in doing. It is certainly important to learn whether impressions irresistably derived from the entire body of testimony lawfully in the case, can be disregarded upon any doctrine of equity procedure.

The theory which is supposed to prevent the establishment of any claim to relief in this case, is that an answer, when responsive to a bill, can only be overcome by two witnesses, or by one witness and strong corroborating circumstances. It is suggested that a complainant who has sworn to his bill cannot, by any subsequent testimony, add to its weight, and that Miles, having answered by an unqualified denial, is not overcome by Bailey's testimony, or any circumstances otherwise appearing.

A bill in chancery is never evidence in favor of complainant, whether sworn or unsworn. The oath of com-

Digitized by Google

plainant verifying it is only needed where required by some statute or rule of practice, and can then only avail in obtaining an injunction or other preliminary relief. It is no evidence on the hearing, unless confessed or admitted. Roberts when placed on the stand as a witness gave his testimony solely in accordance with the statute of 1861, which provides that — with some exceptions — no person shall be excluded as a witness because he is a party: — *L.* 1861, *p.* 168. Being then sworn as a witness, he is to receive such credence as under all the circumstances he appears fairly entitled to. And the same rule must apply to the defendants when placed on the stand. They may be lawfully called by either party, and examined like other witnesses. And the somewhat peculiar question is presented in this case, whether a defendant's answer can serve to counterbalance in his own behalf his own testimony on the stand, so as to neutralize or overcome the latter so far as it appears to deviate from the former. For there is no doubt but that, in the case before us, the defendants' depositions are much more favorable to the complainant than their answer. When it is remembered that a defendant from whom discovery is demanded is, in giving it, a mere witness, to whose statements any extraordinary credit is only given because complainant has seen fit to produce him as reliable, the absurdity of giving to one portion of his testimony an arbitrary preference over another, and still more, a preference in his own favor, is too manifest to need argument. A brief reference to the rules concerning answers in chancery will show that no such consequences can be legitimately drawn from them.

At the common law a party could not be a witness, and could not discredit — (although he might contradict) — any witness whom he might call, unless that witness was one the law compelled him to produce. In equity he could never, after issue joined, examine as a witness

Digitized by Google

any defendant against whom he desired a decree. But he might require of a defendant in his answer a full response to any allegation in the bill, and where a defendant of his own knowledge fully and fairly negatived any allegation, complainant could obtain no relief depending upon that allegation, unless the answer was overcome by more than the equally full testimony of one witness. This is the extent of the rule; and it is based on the theory that a complainant seeking relief has always the burden of proving that he is entitled to the relief prayed, and that if there is nothing presented on his behalf but the conflicting statements of witnesses who, being of equal credit, neutralize each other, the case stands without proof, and the Court cannot act. *See* 2 *Dan. Ch. Pr.* 983 (*Perkins's Ed.*) for a concise statement of the rule. Accordingly, if the witness contradicting the answer is corroborated by any further proof or circumstances, the Court may then decree according to the preponderance of evidence in favor of the complainant. In other words, the rule amounts simply to this, that a decree can never be made in favor of a complainant unless the evidence preponderates in his favor; and that where answer and opposing witness are equally full, fair and explicit, there can be no such preponderance. See 2 *Dan. Ch. Pr.* 985. If, therefore, a defendant on the stand furnishes the means of destroying his own answer, and corroborating complainant's case, his testimony is preferable to his answer, for the same reason which makes any oral examination and cross examination more favorable for eliciting the truth than a statement where the affiant is not pressed to answer questions too rapidly to enable him to deliberate how he can best shape his response to secure his own ends. No one who desires to sift a witness would ordinarily prefer a discovery to an examination on the stand; but under our present system, where both may be resorted to, the choice is not very important. Mr. Headlam is of opinion

Digitized by Google

that now the whole force of the old rule is done away:—2 *Headlam's Dan. Ch. Pr.* 3*d ed. p.* 676. He remarks "The defendant is now, as we have seen, enabled to obtain the benefit of his own testimony, and the Court will probably not be bound by any previous decisions in balancing his testimony against that of a witness." This old practice has often been misunderstood and misapplied, and since the statute has removed the only reason which ever made a discovery by answer necessary, we think there is no longer any occasion for giving to the evidence of a witness in one shape any more force than it would have in another. Strictly speaking, the old rule, when fairly carried out, may not have done so; but it is not to be denied that its existence has led practically, in many cases, to arbitrary and improper conclusions. We are therefore of opinion that an answer in chancery responsive to a bill is now to be regarded as of the same force which it would have were it the defendant's deposition as a witness.

The question then arises, how far the conduct of Miles, as we find it shown by the proofs, precludes defendants from enforcing their claim against Roberts. Inasmuch as he appears to have been the active man in all the transactions with Roberts, no doubt can arise concerning the responsibility of all the defendants for his acts. Nor is there any legal foundation for any claim that Roberts is not entitled to all the rights of suretyship. Miles knew him to be an accommodation indorser, and had no right, therefore, after judgment or before, to interfere to his prejudice. By not defending the suit at law, Roberts is precluded from claiming that the judgment was not binding when rendered. But so far as past transactions tended to explain subsequent ones, and to throw him off his guard, they are not only admissible in evidence but very significant. Having been assured in the outset that he would never be troubled, it is evident he always acted on

Digitized by Google

that idea, and when after the judgment he was assured that the whole matter was arranged or settled, and that he would never be troubled about it, he was justified in believing the statement, and acting upon it. The whole course of Miles was such as to induce any man to believe that no liability was claimed to exist against him. And the statement that money was in hand to pay it — a statement which we are satisfied was made in fact, or in such terms as conveyed that idea to Roberts — would naturally put him at ease completely, and prevent him from taking any measures to protect himself.

It is claimed, however, that it does not appear that Roberts was prevented by this course of Miles from obtaining security; and that he states himself that he never applied to Bailey except on behalf of defendants. He explains, however, that the reason he did not apply for security was because he did not consider himself liable. Where a party abstains from doing what all prudent men are likely to do for their own protection, and where an adequate motive appears for so abstaining, the inference is very strong that the inaction was caused by the motive. The case shows that security might easily have been enforced, and we must conclude, especially when we have direct evidence of the reason, that it was not demanded because Miles had induced Roberts to think it was not necessary.

Leaving out of view then all the questions concerning the actual extinguishment of the claim by payment, or by giving time, or other unauthorized action, we think Roberts entitled to relief on the ground that, by persuading him that he was not liable and would not be pursued, the defendants actually induced him to abstain from securing himself, when he might easily have done it, and when it has since become impossible.

We do not base our decision on the ground that Bailey's property has been disposed of or covered up by the

Digitized by Google

agency of any of the defendants, as the case made by the bill is not completely adequate to sustain independent relief for this cause. But we find nothing in the case, whether properly or improperly introduced, which can diminish the equities which are alleged and proved.

The decree below, enjoining further proceedings against Roberts, must be affirmed, with costs.

The other Justices concurred.

John Beard v. Jedediah Spalding.

Practice: trial in Circuit Court after reference to an auditor.—Where a cause has been referred by the Circuit Court to an auditor, under § 4197 of the Compiled Laws, depositions which have been taken by the auditor, and returned into Court with his report, but not attached to or forming a part of it, can not be used as evidence on the trial of the cause in the Circuit Court.

Heard April 13th. Decided April 19th.

Error to St. Clair Circuit. The case is stated in the opinion.

W. T. Mitchell and *C. I. Walker*, for plaintiff in error.

Conger & Harris and *A. B. Maynard*, for defendant in error, referred to 11 *Pick.* 358; 19 *Pick.* 96; 5 *Met.* 373; 4 *Met.* 40; 8 *Met.* 434.

MANNING J.:

There are a number of exceptions to the rulings of the Court, but they all turn on a single point, viz: the right of the parties to use on the trial depositions taken by the auditor and returned into court with his report, but not attached to or forming a part of it. We must look for a solution of this question to the statute.

Digitized by Google

Section 4197 of the Compiled Laws, provides that whenever a cause is at issue, and it shall appear that the trial will require the investigation of accounts, or the examination of vouchers, the Court may appoint one or more auditors to hear the parties, and examine their vouchers, and evidence, and to state the account and make report thereof to the Court. The four following sections relate to the swearing of the auditors, the giving of notice to the parties of the time and place of their meeting, a hearing by all of the auditors and a report by a majority of them, the summoning and swearing of witnesses, discharging the auditors and appointing others, and recommitting the report for revision or further examination. Then comes § 4202, which is in these words: "The report of the auditors, if there be no legal objection to it, may be used by either party as evidence on the trial before the jury, but it may be impeached and disproved by other evidence produced on the trial by either party."

It is to be observed that the statute does not require the auditors to take the examination of witnesses in writing, or to keep any note or memorandum of the evidence before them. There is no objection to their doing so, and it is highly proper they should keep minutes of the testimony for their own reference. But such minutes, when kept by them, are a private memorandum to be used by themselves only, and not on the trial of the cause. The account stated and reported by the auditors, and nothing else, is made evidence by the statute for either party that may see fit to use it on the trial. If neither party think proper to use it, it is not evidence in the cause. And if used, it is not conclusive, and may be disproved by other evidence. It is not evidence of the balance found by the auditors only, but of each item in both sides of the account, any one of which may be disproved on the trial, without affecting the other items in the account, by witnesses who have been examined before the auditors,

Digitized by Google

or any competent evidence. That such is the object of the statute we think too clear to admit of a doubt. And if a like statute in a sister State has been construed by its courts to admit depositions taken by the auditors to be used on the trial, without the assent of the parties—which we do not think is the case—we do not feel bound by such construction.

The Court below erred in admitting the evidence objected to, and the judgment is reversed, with costs, and a new trial ordered.

The other Justices concurred.

The Michigan Insurance Company v. Gideon O. Whittemore and others.

Appeal in Chancery: what a "final order." — An order of the Circuit Court in Chancery refusing to set aside a decree for irregularity, is a "final order" from which an appeal may be taken to the Supreme Court.

Motion to dismiss appeal. — The right of appeal, in such a case, is a statutory right; and the Supreme Court can not dismiss the appeal on motion, on the ground that the granting of the application made to the Court below was discretionary.

Heard April 12th. Decided April 26th.

Motion to dismiss an appeal in chancery from the Wayne Circuit.

G. V. N. Lothrop and *S. D. Miller*, for the motion.

A. B. Maynard and *C. I. Walker*, contra.

MANNING J.:

This is a motion to dismiss an appeal from an order made after a final decree in the cause, refusing to set aside the decree for irregularity, on the ground that an

Digitized by Google

appeal can not be taken from such an order. The merits of the motion in the Court below are not now before us. The only question is, whether the order appealed from is a decree or final order within the meaning of the statute. That it is final, and not interlocutory, or a step towards a further order or decree to be afterwards made in the cause, based in whole or in part upon it, there can be no doubt; and that the action of the Court in refusing it must be reviewed in this way, if at all, there is no doubt. But it is said that the granting of the motion was discretionary in the Court below. Conceding it to be so, how is this Court to determine that question, without looking into the nature and merits of the motion on which the order appealed from was made? and how can it do this on a motion to dismiss the appeal, without inquiring into the merits of the appeal itself? There may be no ground for the appeal, but that does not go to the right to appeal. They are separate questions; and yet they have been argued together as though the right to appeal depended on the merits of the case made on the motion in the Circuit Court. If the appeal was not a statutory right, but had to be allowed by this Court, it would be proper before allowing it to so far look into the merits of the case as to see that there was some ground for allowing it. But we can not on a motion to dismiss an appeal, regularly taken, decide on the merits of the case appealed. The motion must therefore be denied.

CHRISTIANCY J. concurred. MARTIN CH. J. dissented. CAMPBELL J. did not sit in the case.

Digitized by Google

Marie J. Sage v. Alida Riggs and others.

Attorney fee in mortgage.—A mortgage empowered the mortgagee in the usual manner to sell, "rendering the surplus moneys, if any there be, to the said [mortgagor], after deducting the costs and charges of such vendue and sale aforesaid, and also $100 as an attorney fee, should any proceedings be taken to foreclose this indenture." It was held, that this fee was limited to the case of a foreclosure under the power of sale; and could not be recovered on foreclosure in equity.

Heard April 21st. Decided April 26th.

Appeal in chancery from Wayne Circuit.

The bill was to foreclose a mortgage executed by two of the defendants to complainant, to secure the payment of a bond for $2500. The mortgage empowered the mortgagee, in the usual manner, on default being made in the condition of the mortgage, to sell and convey the mortgaged premises, and from the proceeds thereof to retain the amount due her, "rendering the surplus moneys, if any there be, to the said parties of the first part, their heirs, executors or administrators, after deducting the costs and charges of such vendue and sale aforesaid, *and also one hundred dollars as an attorney fee, should any proceedings be taken to foreclose this indenture.*"

On a reference to a circuit court commissioner to report the amount due on the bond and mortgage, the complainant claimed that the attorney's fee of $100 should be included in the sum due; and the commissioner reported accordingly. The Circuit Court, however, disallowed this item, and granted decree for complainant, for the debt only. Complainant appealed.

H. M. Cheever, for complainant.

Walker & Kent, for defendants.

MANNING J.:

The error complained of in this decree is the non-allowance of $100 attorney's fee for foreclosing the mortgage, provided for in the power of sale. It is insisted

Digitized by Google

complainant is entitled to the $100, whether the foreclosure is in chancery, or at law by advertisement and sale under the power. It is not in a separate clause of the mortgage, standing by itself and providing a fee for foreclosing the mortgage generally, but in the power of sale of which it is a part. The language of the power is, "rendering the surplus moneys, if any there be, to the parties of the first part, their heirs, executors or administrators, after deducting the costs and charges of such vendue and sale aforesaid, and also one hundred dollars as an attorney fee, should any proceedings be taken to foreclose this indenture." The meaning of the words, "should any proceedings be taken to foreclose this indenture," relied on by appellant, is easier asked than answered — nor is it necessary to decide. For they must be understood and construed with reference to the subject matter of the power; that is, a foreclosure by advertisement and sale of the mortgaged premises, and not a foreclosure in equity, of which no mention is made in the power or in any part of the mortgage. I lay no stress on the word *attorney*, as it is not necessary to employ one to execute the power. The decree must be affirmed, with costs.

The other Justices concurred.

Curtis Emerson v. Samuel T. Atwater and others.

Defendant concluded by statements in his answer.—Bill to redeem lands from a deed absolute in form, but alleged to have been given to secure the payment of indebtedness from complainant to defendant, the grantee. Defendant answered under oath — though oath was waived — averring that at the date of the deed, complainant was indebted to him in the sum of $30,000, and that the deed was made to him in satisfaction of this demand, and not as security. On a hearing on pleadings and proofs, the deed was adjudged to be a mortgage, and a reference was ordered to a commissioner to take an account between the parties, and report the amount due. It was held, that defendant was precluded by his answer from showing on the reference that a larger sum than the $30,000 was due him from complainant at the date of the deed.

Digitized by Google

EMERSON v. ATWATER.

If the amount of the indebtedness was incorrectly stated in the answer by mistake, defendant should have applied to the Court, showing how it occurred, and asking leave to amend the answer in that particular.

When answer conclusive on other defendants.—The assignee of said grantee interposed the plea of a bona fide purchase without notice, which plea, on the hearing, was found untrue. It was held, that as he was then undefended except by the answer of his grantor, and was entitled to all the benefits of that, so, also, he was concluded by its statements to the same extent as his grantor himself. He, also, was therefore concluded from showing that more than the $30,000 was due.

Adjusting accounts: annual rests: interest.—Annual rests directed in adjusting accounts between mortgagor and mortgagee, and interest computed on each item of the account, where this course was found to be warranted by the practice of the parties.

Exceptions to the commissioner's report are proper only where the commissioner has come to an erroneous conclusion of law or fact on the evidence before him, touching the reference.

If a commissioner errs in not calling parties before him, to produce books, papers, &c., the proper remedy of the party deeming himself aggrieved, is to apply to the Court for an order requiring him to do so. The error cannot be corrected by excepting to the report.

An exception that "commissioner has credited to complainant the sum of $9,210.37 for amount defendant has received on sales of lots, and interest thereon to May 5, 1860, whereas he should have credited a less sum," is too indefinite and uncertain to admit the raising under it of an objection that the commissioner did not allow to defendant a sum paid to a third person to perfect the title to the lands.

Form of decree for redemption from absolute deed.—Where, on bill to redeem, a deed absolute in form is adjudged to be a mortgage, and the mortgagee had, before bill filed, conveyed to one of the other defendants, the decree should direct the amount due to be paid to the assignee, instead of the mortgagee.

It is proper, in such a case, to direct a sale of the premises to satisfy the amount due, in default of payment by the time fixed, instead of decreeing a strict foreclosure.

Heard December 2d, 8d, 4th and 5th, 1862. *Decided May 3d.*

Appeal in chancery from Saginaw Circuit.

The principal question in this case was disposed of by a decision of this Court reported in 7 *Mich.* 12. By the decree then entered, the case was ordered to be referred to a circuit court commissioner for the county of Saginaw, to take and state an account between the parties on a basis then settled. To the commissioner's report on this reference a large number of exceptions were taken by the defendants, the most of which, on the final hearing in the Circuit Court, were overruled, and decree entered that complainant pay to defendant Atwater the amount found

Digitized by Google

due — about $5,000 — and that defendants reconvey. In default of payment a sale in the usual manner in foreclosure cases was ordered, to satisfy the amount and costs.

Defendants appealed.

W. L. Webber, S. T. Douglass, and J. L. Talcott (of Buffalo, N. Y.) for defendants.

J. Moore, G. C. Bates, and C. I. Walker for complainant.

MANNING J.:

The exceptions are numerous. I shall not notice them all separately. The principal ones are, that the commissioner erred in fixing the indebtedness of complainant at the time the deed was executed at $30,000; in holding the answer of Atwater as to such indebtedness binding on Green; and in crediting complainant, in the account subsequent to May 27th, 1853, with the lumber shipped to Atwater previous to the execution of the deed, and then in his hands unsold. Most of the other exceptions to the commissioner's report will be found to turn on one of these.

Pleadings would avail little or nothing if parties were not bound by them. They would be worse than useless, if parties were permitted to allege one thing in them and to prove another on the trial, or at the hearing. Instead of aiding the court and parties in the subsequent investigation, by narrowing the field of controversy, they would serve as a lure to mislead and entrap an adversary. That the evidence must be confined to the issue between the parties, is a rule so well settled as to admit of no controversy. An attempt was made on the argument to take the present case out of this rule. It was said that if Atwater chose to rest the question of mortgage or no mortgage on a statement of indebtedness less in amount than what was due him in fact, he was not bound by such statement in a subsequent reference after the

Digitized by Google

question had been decided against him. I do not think the argument a sound one. I cannot admit that a fact material to the decision of a question, in one stage of a cause, can afterwards be changed or proved to be different when used by the same party in a subsequent stage of the same cause.

The bill was filed to have a deed given by complainant to Atwater declared a mortgage. In such cases the pecuniary embarrassment of the grantor, his indebtedness to the grantee, and inadequacy of consideration, are circumstances the Court looks to in determining the true character of the instrument. They were all set forth in the bill. And of the three, inadequacy of consideration is the most important. For without that why declare a deed a mortgage? No good would come of it; and there would be nothing to warrant the inference of undue advantage, always relied on by the Court, and made the basis of its action in this class of cases.

Defendants must be supposed to have known what they had to meet, and to have shaped their defense accordingly.

Atwater put in an answer on oath, although an answer on oath was waived by the bill, and Green filed a plea, stating himself to be a bona fide purchaser, without notice of complainant's equities. On appeal, we declared the deed to be a mortgage, and that Green was not a bona fide purchaser without notice, and directed a reference to ascertain the amount due from complainant to Atwater on the 27th May, 1853, — the date of the deed — and for an account to be taken of all subsequent dealings between the parties. Atwater in his answer to the bill says:

"This defendant further saith, that at the time of the execution and delivery of the said deed of conveyance by the said Emerson to him, he, the said Emerson, owed him thirty thousand dollars, for advances made to him theretofore, and became and was insolvent, and proposed to and did,

Digitized by Google

execute and deliver to this defendant, the said deed of conveyance, in fee simple, in consideration of the said debt — subject to said incumbrances described in said bill of complaint — and that said deed of conveyance was executed and delivered absolutely, without any condition, trust or agreement whatsoever, either express or implied; and that, at the time of the said conveyance, his said debt, together with said incumbrances, far exceeded the whole value of the said lands; and that the statement in said bill of complaint, that such deed of conveyance was, or is, subject to any condition, trust or agreement, is wholly untrue.

"That at the time of the execution and delivery of the said deed of conveyance, this defendant held and owned a mortgage upon the said premises, for the first accruing part of his said demand, to the sum of $8,200, executed and delivered to him by the said Emerson — bearing date November 1st, 1850 — to secure to him the payment of the said $8,200 according to its terms (recorded November 5th, 1851, in B of mortgages, on pages 155 and 156), and that, at the time of the execution and delivery of the said deed of conveyance, the said mortgage moneys were wholly unpaid, as well as the balance of the said thirty thousand dollars: and that the said deed of conveyance was executed and delivered to him by the said Emerson in lieu of and as a substitute for the foreclosure of said mortgage, to release his equity of redemption in the said lands."

Here is a clear and explicit statement on oath of complainant's indebtedness to Atwater at the time the deed was given. There is no ambiguity in it. He is so particular as to state that a mortgage of $8,200 is a part of it, and that complainant's "said debt, together with said incumbrances" (incumbrances on the property due to others) "far exceeds the whole value of the said lands." Why this last statement if it was considered immaterial

Digitized by Google

by the pleader to the investigation that was about to follow? And if material, as it certainly is, can we suppose a debt of forty-six thousand dollars and upwards would have been stated in the deed and answer at $30,000? We can hardly presume such a mistake possible. And if a mistake, Atwater should have applied to the Court, showing how it occurred, and asking leave to amend his answer, which must be taken as true against him.

But it is insisted by Green's counsel that if Atwater's answer is binding on him, Atwater, as to complainant's indebtedness, Green is not bound by it. The ground of the objection is, that the answer of one defendant is not evidence against a co-defendant. This, as a general rule, is true where the interests of the different defendants are several and not joint. If Atwater had stated in his answer that when he conveyed to Green, he, Green, knew that complainant's deed to him was only intended as security for the payment of the aforesaid $30,000, the answer could not be received as evidence of that fact to disprove the truth of Green's plea. It would come within the rule referred to. But I do not understand the rule to go further than this; and that where a defendant seeks to get rid of one equity by interposing another, and fails in it, that the evidence that establishes the first equity against his grantor is not sufficient to establish it against him also.

The plea admitted the allegations in the bill; and it having been found untrue by the Court on the hearing, Green stood defenseless, except so far as he was protected by the answer of Atwater. He is entitled to all the benefits of Atwater's defense, but we know of no rule of law or equity giving him the right to claim and repudiate its benefits at the same time, or to claim a part and repudiate a part. Besides, he took the land subject to the equities between complainant and Atwater growing out of the agreement and deed of the 27th May, 1853. These equities did not cease, and the relation of the parties

Digitized by Google

was not changed by the conveyance of the land to Green. For complainant and Atwater continued to deal with each other thereafter as before, with the knowledge of Green, and without any objection on his part. And there is no pretence of collusion or combination between them to defraud Green. When this case was before us on the former appeal, we came to the conclusion that the deed to Green was itself a mortgage to indemnify him for past and future advances to Atwater, and that their interests were the same, and that for that reason Atwater could not be a witness to prove the truth of Green's plea: — 7 *Mich.* 31, 33.

I think the commissioner was right, therefore, in holding the defendants bound by the statement in Atwater's answer, that the debt was $30,000 on the 27th May, 1853. But I think he erred in crediting complainant, in the subsequent account made out by him between the parties, with the unsold lumber in Atwater's hands at that time. The evidence and surrounding circumstances show, pretty clearly, that this lumber must have entered into the adjustment made by the parties of their matters at the time the deed was executed.

Complainant owned a mill and was engaged in the manufacture of lumber. Atwater made advances to him, and received most of the lumber, which he sold and accounted for to complainant. A part was sold by him at Buffalo, where he resided, but the greater part was shipped by him to Albany, where it was sold for him by the persons to whom it was consigned. There was always more or less lumber unsold in the hands of Atwater and his consignees, on rendering his accounts, subject to be thereafter sold and applied by him in liquidation of any balance that might be due to him. Is the $30,000, stated in Atwater's answer, the balance of an account subject to be reduced by the sale of lumber then on hand, or is it

Digitized by Google

the amount due Atwater after accounting for the lumber on hand, as well as for what had been sold?

The answer fixes a limit to the indebtedness beyond which defendants cannot be permitted to go. It does not fix the amount of the indebtedness as to complainant. That defendants had to prove. The amount proved by them before the commissioner, including the mortgage of $8,200, which we think was improperly excluded by the commissioner, was $46,284.45, instead of $30,000. If the object of the deed was security for the existing debt, with the lumber on hand to be thereafter accounted for when sold and applied in liquidation, why was not $46,284.45, stated as the consideration in the deed, instead of $30,000? We confess our inability to answer this question except in one way, and that is, that the value of the lumber on hand must have been estimated by the parties and deducted to reduce the amount to 30,000. This could be done with considerable accuracy by the parties, with the experience of the past to guide them. The amount — just $30,000 — the consideration stated in the deed and sum sworn to in the answer — would seem to indicate an adjustment by the parties of their accounts on some other principle than mathematical certainty, and yet probably sufficiently certain to prevent wrong to either party. But what would seem to be almost conclusive on this point, is, the utter silence of the bill of complaint, which sets up no claim whatever for lumber in Atwater's hands at the date of the deed. It states various subsequent matters which it claims to set off against the debt; as the sale of the Steam Mill Reserve, the sale of logs and other personal property, and the like, but makes no mention whatever of lumber in the hands of Atwater to be sold and applied by him on the debt. We can not account for this silence on any other principle than the one we have stated. We can not presume an item of such magnitude was forgotten by complainant, while others of much

Digitized by Google

less importance were remembered; or that it escaped the attention of both himself and solicitor in framing the bill.

In the two accounts made out by the commissioner — one of all dealings between the parties prior to giving the deed, and the other of dealings between them afterwards — the commissioner has charged defendants with much more lumber than the evidence shows was shipped by complainant to Atwater. The views we have expressed render this immaterial as to the lumber delivered before the deed was given. We mention it here, however, that it may not be said—on the supposition that the commissioner's report is correct as to the amount of lumber charged to defendants — that the value of the lumber in Atwater's hands would exceed by several thousand dollars the difference between $30,000 and $46,283.45. From the best data furnished by the evidence we think the two would about balance each other.

Two cargoes of lumber were shipped after the giving of the deed, one to Chicago and the other to Buffalo. The one to Buffalo was shipped by Dorr, from whose testimony it appears that the entire cargo belonged to Atwater, and no part of it to Emerson, it being made up in part of lumber, and some bundles of lath, purchased of Emerson by the bill of sale of the 17th June, 1853. The cargo previously shipped to Chicago it would seem was complainant's lumber, and should be credited to him, but not the cargo shipped by Dorr to Buffalo, for the reasons we have stated.

Exceptions were taken to the commissioner's mode of allowing interest. He allows interest on each item from its date, on both sides of the account, without making rests in the account. Having come to the conclusion that there was a settlement between the parties on the 27th May, 1853, when complainant was found indebted to Atwater in the sum of $30,000 which the deed was intended to secure, we are of opinion that the subsequent

Digitized by Google

transactions between the parties, from that time to the filing of the bill, were of such a nature — all having reference, on one hand to the extinguishment of the debt, and on the other to advances made to Emerson, or to pay off the prior incumbrances — that the commissioner should have made three annual rests, the last of which would have been the 27th day of May, 1856, a few days after the filing of the bill, allowing interest only on the balance then found due from that time to the making of the report. This, as well as the allowance of interest on each item in both sides of the account, was warranted by the practice of the parties in settling the lumber account between themselves (for there was a prior indebtedness that never entered into these settlements), when the balance was either carried to the new account to draw interest, or was settled by a note given for the amount, payable presently, or at a future day with interest.

It was also objected to the report, that the commissioner did not call on either of the parties to produce books, papers or vouchers, relating to the matters referred to him, and did not examine the parties under oath. If the commissioner erred in either of these particulars to the detriment of defendants, they should have applied to the Court below by motion, for an order requiring the commissioner to do what he should have done. This is the practice where proper testimony is refused on a reference. The error can not be corrected by excepting to the report. Exceptions to the report are proper only where the commissioner has come to an erroneous conclusion of law or fact on the evidence before him, touching the reference:— *Schwarz v. Sears*, Wal. Ch. 19; *Ward v. Jewett*, *Ibid.* 45; *and see Hoff. Mast. in Ch.* 58, 59.

When this cause was before us heretofore, we expressed no opinion as to the Jennison interest, and so stated at the time. It appeared from the papers then before us, that there was such an interest in the property when

Digitized by Google

complainant conveyed to Atwater, who afterwards purchased it. But as nothing was said of it on the argument, we did not take it upon ourselves to decide any question that might be made in regard to it. It is now insisted by Green's counsel, as an objection to the commissioner's report, that the commissioner did not deduct from the proceeds of lots sold, and with which he charged defendants, an amount equal to the Jennison interest in the property. The question does not appear to have been made either before the commissioner or in the Court below. It would seem to be now raised for the first time. And it is a sufficient answer to it in the shape in which it comes, that no exception is taken to the report for the reason stated in the objection. The 43d exception is: "For that the commissioner has credited to complainant the sum of $9,210 37, for amount Atwater has received on sales of lots and interest thereon to May 5, 1860, whereas he should have credited a less sum." But this exception is too indefinite and uncertain to admit the raising of such an objection under it. It points to nothing. It is aimless. It finds fault with the report, without giving any reason for it, except the common one always given by the vanquished party, viz: that the decision is wrong and that great injustice has been done to him. It is necessary, however, that we should determine it, that this litigation may come to an end. What the Jennison interest is, does not very clearly appear. It is stated by counsel to have been an undivided two-fifty-fifths of the property, exclusive of the mill. On 1st July, 1853, complainant wrote Atwater that he had just finished platting the property, and that he had sold a number of the lots, stating the persons to whom sold and the prices. He then says: "Mr. Jennison, from New York is here, the person who owns a fractional interest in this property. I saw him yesterday, and he is to meet me sure during this week, and agree upon two persons to make a division. If he will sell at a reasonable

Digitized by Google

price, and give liberal time, I will try and buy his interest." On 27th August, 1853, Jennison quit claims his interest to Atwater, for $800 — $200 cash, and two notes for $300 each. The notes and cash were sent by Atwater to Jennison's attorney, through complainant. The purchase, under the circumstances, must be deemed to have been made by Atwater for the benefit of the property, and to facilitate the sale and disposition of it to pay the mortgages on it, and the debt to Atwater. Atwater's relations with complainant, and the circumstances under which he acted, were such as not to admit of his purchasing it in his own right. He must however be credited with the $800 he paid for it.

A question was made before the commissioner as to what part of the premises were included in the Steam Mill Reserve sold to Atwater by complainant. No such question it is said was referred to the commissioner. That is true; but it came before him incidentally, in inquiring, as he was directed to do, what part of the premises remained unsold and not under contract of sale. This inquiry was necessary to enable the Court to shape its decree for a reconveyance by defendants. It involved an inquiry into the extent of the Steam Mill Reserve if there was any question in regard to it, but not otherwise. The commissioner reported as a part of the unsold premises, "blocks Nos. 109, 110, 111 and fractional block No. 112, as shown by a map of the city of Saginaw, dated February 1st, 1837. Said blocks being on the middle ground between the Saginaw river and a bayou, or an arm of the river, by which they are separated from the steam mill and six acres, and the other property." Saginaw city is on the west side of Saginaw river. Why the map of the city was made to extend across the river and include a part of what is now East Saginaw, on the east side of the river, does not appear; while the evidence shows that that part of the map was never acted upon or considered of

Digitized by Google

any validity whatever. Complainant, in 1853, soon after the deed to Atwater, and after the sale of the mill property to him, caused the property to be platted by one Carleton. Complainant and Atwater were both interested in the making of this plat. It was made under the supervision of complainant, was paid for by Atwater, and was recognized and acted on for years thereafter by both parties without complaint from either. It must, as a joint act of the parties, be regarded, so far as it goes, as conclusive evidence of what was understood by them to be the mill property. Is the middle ground, then, according to this plat, a part of the mill reserve? We think not. By it the "Steam Mill Reserve" is bounded northerly by Bristol street, easterly by Washington street, and on the south by the south line of the plat, which is also the south line of the property platted. Westerly is the bayou, and beyond the bayou and between it and Saginaw river is the middle ground. The south line of the plat stops at the bayou. It is not extended westerly across the middle ground. There is nothing, in short, on the face of the plat showing an intention to plat the middle ground at that time. By the Saginaw city map, east of the river, the middle ground is platted, but it forms no part of the mill property. We can not, therefore, say that the middle ground is a part of the mill reserve according to either of these plats. And there is no evidence it was ever used in connection with the mill, except the shore, for fastening a boom for logs to be sawed at the mill. This right, with the right to use the whole of the bayou for a boom, we think, from the evidence in the case, passed as an appurtenance to the mill property, but nothing more.

Exception 85. Three hundred and twenty-five dollars must be deducted from the $1,400 allowed by the commissioner — that being the amount paid by Atwater to

Digitized by Google

Lyon when the premises were surrendered, less seventy-five dollars rent.

Exception 84 is allowed. The scaling of the Hart logs was before the 17th June, 1853, when they were sold by complainant to Atwater and Durfee.

Exception 58 is also allowed. The $168.34 for sawing 48,055 feet of logs delivered in 1854, must be struck out. This item was, by mistake, credited to complainant in defendant's account, from which it was taken by the commissioner. It should have been a credit for 42,023 feet of logs, instead of for sawing. Complainant is credited with sawing 2,376,906 feet of lumber, all that is claimed by him, without including this item. And defendants must be charged $4.00 instead of $5.56 per thousand for 642,139 feet pine E. logs, delivered at Cass river. They are charged at $4.00 in complainant's account, and a like amount of logs is credited at $4.00 in defendant's account. The two accounts agreeing in quantity and price, we think the commissioner should have credited complainant with them at $4.00 and no more.

As it regards the form of the decree, it should have required the amount due from complainant to be paid to Green instead of Atwater. There is nothing wrong, however, in directing the property to be sold in default of payment. The deed was intended as something more than a mere mortgage to secure what Emerson was owing Atwater. Its purpose was to enable him to sell the property and pay the incumbrances on it, and also the debt due to himself, and the decree, in ordering a sale instead of a foreclosure in default of payment, but carries out the original intention of the parties.

The decree of the Circuit Court is reversed, with costs, and the report of the commissioner is referred back to him, with instructions to make his report conform to the views herein expressed.

Digitized by Google

CHRISTIANCY J. concurred in this opinion. MARTIN CH. J. concurred in part, but dissented from some of the conclusions. CAMPBELL J. did not sit, having been of counsel.

John B. Fiquet, Jr. and another v. James Allison.

Tenancy in common of crops put in on shares.—One J. put in wheat on shares on defendant's lands, and was to have possession of the land, and do other farm duties upon shares of other produce. As there was no proof that it was agreed that J's rights in the crops should be forfeited by non-fulfillment of any other conditions, and no evidence of damages from any such non-fulfillment, it was held, in a controversy between defendant and plaintiffs, to whom J had mortgaged the crops while growing, that J was clearly tenant in common of the crop.

What amounts to a conversion: assumpsit in case of.—When the crops were ripened, plaintiffs harvested them, but defendant drew them off, threshed them, placed them in his granary, and refused to recognize any rights of plaintiffs therein, or to deliver their share. *Held*,

First:—That this exclusive possession of the crops, and denial of all right of plaintiffs therein, amounted to a conversion.

Second:—That the tort might be waived and assumpsit brought for such a conversion, although no sale of the grain was proved except of a trifling portion, not equal to defendant's own separate interest.

The grain being in marketable condition, the defendant in possession was bound, on reasonable request, to have the share of his co-tenants measured out to them; and for a breach of this duty, which the law implied from his express contract, assumpsit is as appropriate a remedy as any other, if plaintiffs see fit to resort to it.

Heard April 7th Decided May 3d.

Case made after judgment, from Livingston Circuit. The facts, so far as necessary to an understanding of the legal questions, are stated in the opinion.

G. V. N. Lothrop, for plaintiffs:

We claim the plaintiffs entitled to recover.

1. They prove by Jarvis the agreement to take defendant's farm on shares, for one year, and his entry on it and the putting in the crops.

Digitized by Google

2. This contract gives him a title as tenant in common to his share of the crops put in by him:—8 *Johns.* 151; 8 *Cow.* 220; 15 *Wend.* 379; 21 *Vt.* 172; 15 *Barb.* 333; 17 *Ala.* 162; 17 *Ala.* 172.

This contract is not a lease, but a contract to work on shares.

Whether Jarvis performed his whole agreement or not; whether he was justified in leaving the farm or not in November, is a matter of no consequence. It does not affect his *title* to his share of the growing crops. And this action is based on that title.

The defendant refused to deliver the plaintiffs their share of the wheat; denied their right to any of it, and actually sold part of it.

This was, in effect, a conversion of the wheat to his own use, and trover would lie:—31 *Barb.* 569; *Webb v. Mann*, 3 *Mich.* 139.

And the plaintiffs can waive the tort and maintain assumpsit:—3 *N. H.* 384; 3 *Eng.* 202; 4 *Penn.* 295; 15 *Ohio*, 9; 1 *Hill*, 240; 5 *Hill*, 583.

M. B. Wilcox for defendant:

Jarvis had no interest in the grain that he could mortgage. His contract with defendant was not severable, and to entitle him to any portion of the crops, there should have been, at least, a substantial performance on his part. Whereas, he utterly failed in every essential particular of his agreement:—5 *Mich.* 449; 1 *Chit. Pl.* 303; 10 *Mass.* 287; 10 *Pick.* 205.

If Jarvis had any interest in the grain mortgaged, the plaintiffs, by virtue of the mortgages, became tenants in common of the same with defendant.

And to enable them to maintain this action they must show a conversion of *the whole property* by defendant:—2 *Greenl. Ev.* § 646, *and note* 8: taking the exclusive possession of the property, and refusing to deliver it on

Digitized by Google

demand not being sufficient:—*Co. Litt.* 200; 3 *Johns.* 175; 1 *Taunt.* 241; 13 *Me.* 192; 15 *Johns.* 179.

For this, either may lawfully do, each being equally entitled to the possession:—7 *Mass.* 137; 2 *Greenl. Ev.* § 646.

Trover is the action usually brought by a tenant in common against his co-tenant for conversion of common property; and, to sustain that action, a "loss, destruction or sale" must be shown:—2 *Hill*, 47; 22 *Me.* 287; 9 *Cow.* 230; 7 *Wend.* 449; 3 *Mich.* 143; 1 *Taunt.* 241.

Assumpsit can *only* be brought in case of a sale of the property:—2 *Greenl. Ev.* § 120. An *actual sale* must be shown:—5 *Pick.* 285; 10 *Id.* 161; 12 *Id.* 120; 3 *Watts*, 277.

In such cases it is said the tort may be waived and assumpsit may be brought *to recover the proceeds of the sale*, but there must be a tort to be waived for which trespass or case would lie:—10 *Pick.* 161.

It is difficult to conceive, then, so long as there is no tortious act shown, no conversion, no sale, how this action can be maintained.

CAMPBELL J.:

Plaintiffs sued defendant for the value of certain grain in which they claimed an undivided interest, and which, upon demand of their portion, he refused to surrender, denying their rights.

The grain was grown on shares upon defendant's land, by one William Jarvis, who was to have possession from April 1858, to April 1859, and to put in crops on shares, and to do other farm duties upon shares of other produce. Some question was raised concerning his complete fulfillment of the various arrangements; but, as there is no proof that it was agreed his rights in the crops, as a tenant in common, should be forfeited by non-fulfillment of any other conditions, and as there is no proof of dam-

Digitized by Google

ages growing out of such non-fulfillment, it becomes unnecessary to consider whether the evidence will, or will not, warrant a conclusion that he failed in any duty. As the case stands, he was very clearly a tenant in common in the crops.

While they were yet growing, he mortgaged them to plaintiffs, who, at the proper season, caused them to be harvested, when they were drawn off by defendant, who threshed the grain and put it in his granary. He seems to have intimated some formal objection, in the outset, to the right of any one but himself to cut the grain; but subsequently, while it was being cut, recognized plaintiffs' privilege to do so.

Two questions arise upon the facts:

First, whether defendant's denial and refusal to recognize plaintiffs' rights or deliver their share, amounted to a conversion; and *secondly*, whether assumpsit will lie for such a conversion; no sale being proven, except of a trifling portion of grain, not equal to the defendant's own separate interest.

It is laid down by most of the authorities, that a refusal, by one tenant in common of a chattel, to relinquish possession, is no conversion, because each has as good a right to the possession as the other. But it can hardly be questioned that the refusal of any one to give up to another that to which such other has a *better right*, would be a conversion. The doctrine referred to applies to things in their nature so far indivisible that the share of one can not be distinguished from that of another. But it can have no reasonable application to such commodities as are readily divisible, by tale or measure, into portions absolutely alike in quality: as grain or money. When one person is entitled to half of twenty bushels of wheat in a mass, he is entitled to have ten bushels in severalty: and it would be destructive of all his beneficial rights to hold that his co-tenant in the heap could refuse a divi-

Digitized by Google

sion, when properly demanded; or that one who held one hundred dollars for himself and a co-tenant, could retain the fifty dollars of each. In the case at bar, defendant refused to give up any portion of the grain, and denied that he had any grain for the plaintiffs. Such an absolute denial of title, and refusal to recognize the rights of his co-tenants at all, would, we think, amount to a conversion, under any circumstances. It is difficult to see how a sale would work any greater prejudice to the co-tenants, who are effectually deprived of their property, so far as it is in his power to deprive them.

The question then arises, whether an action properly lies in assumpsit. It is said in several of the cases, that, where property has been tortiously taken, and converted by *sale*, the owner may affirm the sale, and sue for the proceeds in assumpsit; but that where there has been a conversion without sale, the tort can not be waived. It certainly is somewhat anomalous to place parties in contract relations against their will, where no privity exists: and the cases where it is permitted seem to be justified only on the ground that no prejudice can result to the defendant by allowing it. But where a party commits a breach of a duty, which the law implies from his express contract, assumpsit is as appropriate a remedy as any other, if a plaintiff sees fit to resort to it. The plaintiffs here derived their rights, as tenants, from the contract of defendant with their grantor, creating the tenancy. The grain being in marketable condition, the co-tenant in possession was bound, on reasonable request, to have the plaintiffs' share measured out for them. His own contract precludes him from claiming more than his proportional amount. When he concludes to retain the remainder, he certainly is bound to pay for it: and the plaintiffs may, by their consent, convert the transaction into a sale; as it would have been a sale originally, had such consent been given at the time. We think no principle of law is vio-

Digitized by Google

lated by allowing the action to be maintained in its present form.

Judgment must be rendered for plaintiffs, for $110.48, being the value of the grain when converted, with interest. They are also entitled to costs of both Courts.

MARTIN CH. J. and MANNING J. concurred.

CHRISTIANCY J. did not sit in this case.

City of Detroit v. Detroit and Erin Plank Road Company.

Power of plank road company to change location of gates.—A plank road company has general power to change the location of its gates, and to erect new ones, unless specially restricted.

Exclusion of gates from city limits—subsequent extension of limits.—A plank road company occupying for their purposes a road leading from the city of Detroit, procured an amendment to their charter, by which they were "empowered to extend their road on Gratiot street to Randolph street in the city of Detroit: *provided*, that no toll gate shall be erected or maintained within the limits of said city by said company." Subsequently the city limits were extended by statute so as to embrace a portion of the original road upon which a gate had before been erected. It was held, that the amendatory act did not restrict the original powers of the company to erect and maintain a gate on any portion of the road then outside the city limits, but only prohibited any gate upon the extension of the road which was authorized by the amendatory act.

Heard April 23d. Decided May 3d.

Certiorari to the Recorder's Court of Detroit.

Defendants were prosecuted in the Recorder's Court under a city ordinance, for obstructing the Fort Gratiot Road by a toll house and toll gate. The case was tried in the Court below upon the following stipulation, signed by the attorneys for the parties, as the sole evidence.

"The defendant was incorporated by a statute entitled 'An act to incorporate the Detroit and Erin Plank Road

Digitized by Google

Company,' April 3d, 1848, and published on page 382 of the Session Laws of that year.

"This act, and the other acts referred to hereafter, may be read in evidence, and is made a part of this stipulation as much as though copied entire herein.

"When the above charter was granted the eastern line of the city was along Dequindre street.

"In 1849 the company built their road, and erected a toll gate and house in the street within what is now the tenth ward of the city of Detroit. Said gate and house were removed from their first position to their present position as hereafter stated, in the year 1862.

"In 1851 the Legislature authorized the company to extend their road into the city along Gratiot street to Randolph street, with a proviso that no toll gate should be erected or maintained within the limits of said city. Laws of 1851, p. 35.

"The company extended their road accordingly.

"In 1857 the corporate limits of the city were extended on the east so as to embrace what is now the tenth ward. Laws of 1857, p. 209.

"The company now maintain a gate and house in the street on the Fort Gratiot Road, near the corner of Elmwood Avenue, within the tenth ward.

"Fort Gratiot Road was built by the United States while Michigan was a Territory.

"It is hereby agreed that this case shall be submitted to the Court on the above stated facts, without other evidence."

The Recorder's Court, on this stipulation, found the defendants not guilty.

T. H. Hartwell, City Attorney, and *D. C. Holbrook* for the prosecution:

The plaintiff in error contends, that the act of 1851 cannot, by any fair construction, give the company a right

Digitized by Google

to maintain a gate within the city limits, as thereafter at any time established; *the then present* intention of the act was to prevent it; and why should it give a right by mere implication to do afterwards what the act then prohibited?

The inconvenience of a gate was intended to be prevented by the act; and can it be supposed that while the road could not maintain a gate within the then limits, that this prohibition should not operate on a future extension of city limits? as though one part of the city should be, and another part not, subject to the inconvenience of a gate, ignoring the probability of a necessary extension of the city limits.

It will be said that because the company was allowed to extend its road into the city, if the prohibition was not annexed, a gate might be maintained under the original act any where within the city. In reply to this we say, it was a part of the contract prospectively that no gate should be erected on the extension of the city limits: — *Regina v. Cottle*, 3 *E. L. & Eq.* 474.

Walker & Kent, for defendants:

The power of the Legislature to grant to the company the use of the Fort Gratiot road is settled in *McKay v. D. & E. P. R. Co.*, 2 *Mich.* 138. Under their right to erect toll gates, they may change their gates, or erect new ones, when necessary: — *Cheshire Turnpike v. Stevens*, 10 *N. H.* 133. They can erect toll gates and toll houses in the street: — 2 *W. & S.* 548; 6 *W. & S.* 378.

The right of the company under the original charter, to maintain the toll gate complained of, will not be questioned. The place was then without the city. The mere extension of the city limits could not take away this right. The act amendatory of defendant's charter clearly referred to the city as then limited, and discloses

Digitized by Google

no intention to restrain the powers given by the original charter. There is no substantive enacting clause which intimates such a purpose; and to say that it was sought to be obtained by a proviso only, is a novel legal proposition. A proviso is *a limitation* of a previous declaration, deed or grant:—10 *Pet.* 449; 10 *Wheat.* 30. The purpose of the act was clear. The company desired to extend their road into the city. The Legislature was willing to grant that right. But an unqualified grant might seem to carry over the extension the existing incidental franchises of the company. Hence the claim to erect gates on the extension might be set up. This the Legislature did not intend to permit. It was therefore said; "you may extend your road within the city limits, *provided*, you shall not erect and maintain gates within those limits."

CHRISTIANCY J.:

The only question in this case, is, whether the plank road company had the right to erect and maintain a toll gate on the Fort Gratiot road, or Gratiot street, in the tenth ward of the city of Detroit.

By the charter of the company — *Laws of* 1848, *p.* 382 — they were authorized to establish and construct their road "*from* the city of Detroit in the county of Wayne, on the Gratiot road, so called," to, &c. Their right to the use of the Gratiot road for this purpose was affirmed in the case of *McKay v. The Detroit & Erin Plank Road Co.*, 2 *Mich.* 138.

Under the General Plank Road Law of 1848 — *Laws of* 1848, *p.* 65, § 17 — which was made a part of their act of incorporation, the company had power to erect and maintain toll gates; and it is provided that "such toll gates so to be erected by such company may be as many in number, and located at such points, as such company may deem necessary." The general power to change the location of a gate once erected, or to erect new ones,

Digitized by Google

unless specially restricted, can not be doubted. See *Cheshire Turnpike v. Stevens*, 10 *N. H.* 133.

The road was constructed in 1849, and a toll gate erected within what is now the tenth ward of the city; and, it would seem, near the place of the present gate; how near does not appear. This ward was not then, nor until 1857, within the city limits; but the corporate limits were then extended by the Legislature, and this ward added to the city. The location of the gate seems to have been changed in 1862, but which way or how far does not appear; nor is it material, as the places of both the former and present gates were outside of the city limits until 1857.

There can be no doubt that, under their original charter, the company had the right to erect and maintain their gate in the place where it was first located, and which was then without the corporate limits of the city. Nor do we see any more reason to doubt that, under that act, unless altered in this respect by the amendatory act of 1851, they would still have the right to continue the gate, or erect and maintain a new one, at any point on their road, not within the city limits as established at the date of the charter and when the road was constructed, notwithstanding the subsequent extension of the city limits so as to include the place in question. But their rights terminated at the city line, as then established. They could neither extend their road, nor construct a gate within the city. But in 1851 the company, it would seem, were desirous of obtaining the right to extend their road into the city; and, by an act amendatory of their charter — *Laws of* 1851, *p.* 36, § 2 — the Legislature granted them this power in the following words: "Said Detroit and Erin Plank Road Company may, and they are hereby empowered to extend their road on Gratiot street to Randolph street in the city of Detroit; Provided, that no

Digitized by Google

toll gate shall be erected or maintained within the limits of said city by said company."

We have not been able to discover in this amendatory act any indication of an intent to restrict or impair any of the powers granted to the company by their original act of incorporation. Its object clearly was to grant to the company powers additional to those it already possessed; and the purpose of the proviso was to restrict or qualify that additional grant of power, and that only. The proviso is no more extensive in its operation than the power which it qualifies; and both are confined in their operation to that part of the road authorized to be constructed between the city limits, as then established, and Randolph street. The Legislature have merely said to the company, "you may extend your road into the city as far as Randolph street; but, in doing so, you shall not erect or maintain a toll gate upon the portion thus extended." To extend this proviso to the original act, would be to disregard the plain purpose for which the amendatory act was passed, and to change the proviso into a positive and independent enactment.

Had this proviso been inserted in the original charter of the company, as a limitation of their powers, the case might have fallen within one of the principles recognized in *Regina v. Cottle*, 3 *Eng. L. & Eq.* 474. But even then, to bring this within the controlling principle of that case, it should further have been made to appear, not merely that the gate was within the territorial limits of the city corporation, but that the town had been actually built up along that portion of the road; in other words, that the gate was upon the *street* of a *town or city de facto*, where the public inconvenience would be very great, rather than upon a road in the country, where it would be very little. Here it does not appear that there was a house or other building within a mile of the gate.

Digitized by Google

The judgment of the Recorder's Court must be affirmed, with costs.

The other Justices concurred.

John C. Blanchard v. Timothy M. Tyler and another.

Bona fide purchaser, who is. — To constitute a bona fide purchaser there must be want of notice both at the time of the purchase, and at the time of payment. Warner v. Whittaker, 6 Mich. 133.

Where, therefore, the defendant gave his note, not negotiable, for land of which complainant held a prior unrecorded deed, but was fully informed of complainant's equities before making payment of the note, it was held that he could not claim the protection of a bona fide purchaser.

Bona fide purchaser: who may claim rights of. — The defense of a bona fide purchase can only be made by the purchaser himself, or by some one claiming through his purchase.

Deed of lands: presumption as to time of delivery. — Where a deed is acknowledged on a day subsequent to its date, and there is no proof of delivery prior to the acknowledgment, it must be presumed to have been delivered afterwards; such being the usual course and practice in reference to the delivery of deeds and other instruments intended for record.

Landlord and tenant: attornment to third person. — It is entirely incompetent for a tenant, without the consent of his landlord, to change the nature of his tenancy, by attornment to a third person: — Byrne v. Beeson, 1 Doug. Mich. 179.

Bill to quiet title: complainant's possession. — Bill to quiet title to land. It appeared in evidence that a person who was in possession as tenant of a third party, had, with his landlord's assent, attorned to two persons who were not shown to have any interest in the land, and one of whom afterwards, as agent for the complainant, executed a lease of the whole land to the tenant. It was held that this lease would estop the person signing it as complainant's agent from setting up any claim as against complainant, and that the possession of complainant by his tenant under it, ostensibly of the whole, and rightful at least for one half, was sufficient to enable complainant to maintain a bill, under the statute, to quiet his title to the land as against a third person claiming it.

Heard April 21st. Decided May 3d.

Appeal in chancery from Shiawassee Circuit. The facts are stated in the opinion.

A. Gould and *A. Pond* for the complainant, argued that, independent of the question of possession by com-

Digitized by Google

plainant, the bill might be maintained. The claim of complainant is to be relieved against the deeds of Tyler & Hearse obtained to commit a fraud, and the Court has jurisdiction, independent of the statute, to cancel a deed obtained by fraud, and which is a cloud upon title: — 5 *Paige*, 501; 2 *Paige*, 482; 14 *N. Y.* 6; *Story Eq. Juris.* 699, 700; 9 *Paige*, 388; 6 *Pet.* 5.

McCurdy & Raynale, for defendants, insisted, among other things, that complainant was not only not in *possession* of the land, but that he had no title to it; as by his own evidence it appeared that Lewis conveyed the land to Simonson one day before the execution was issued under which complainant claimed.

CHRISTIANCY J:

The bill was filed against Timothy M. Tyler and James Hearse, to remove a cloud upon complainant's title to an eighty acre lot of land in the county of Shiawassee.

The land was patented by the United States to Ira Merrill in 1837.

Merrill (and wife) conveyed to Augustus Grosvenor, July 4, 1838.

Grosvenor conveyed to George Dahash, August 2, 1853.

Dahash (and wife) conveyed to Abram Lewis, July 13, 1855.

All the above deeds were recorded soon after their date, except the one from Grosvenor to Dahash, which was not recorded till the 24th day of May, 1859; and this delay gave occasion to the transactions which led to the present suit.

Complainant derives his title through an execution sale to him upon a judgment against said Abram Lewis. The levy was made December 30th, 1856; the sale, February 28th, 1857: the sheriff's certificate of sale was filed with the register of deeds March 3d, 1857, and his deed was

Digitized by Google

executed to the complainant June 9th, 1860, after the time of redemption had expired, and was recorded the same day. Such is the title shown by complainant.

The defense rests mainly upon a deed from Grosvenor to Tyler, which will be presently noticed. On the 17th day of May, 1858, a few days before the time of redemption expired, Lewis, the defendant in the execution, executed a deed of the same lands to defendant Tyler; but this deed being executed long after the certificate of sale to complainant was filed, was void as against complainant; Tyler being chargeable with notice of the execution sale. But on the 21st day of May, 1858, Tyler obtained a quit claim deed for the same land from Augustus Grosvenor, whose deed to Dahash had not yet been recorded. The bill alleges that Tyler at the time he obtained this deed had knowledge of the previous deed to Dahash, and of complainant's rights, that the deed was without consideration, and that Tyler fraudulently procured it for the purpose of cheating and defrauding the complainant. From a careful examination of the testimony — which we do not deem it necessary here to review — including that of Tyler himself — which charity to him would hardly permit us to review — we are entirely satisfied that these allegations of the bill are well sustained by the proof. As against complainant, therefore, Tyler acquired no title either by the deed from Lewis or by that from Grosvenor.

But on the third day of August, 1858, Tyler (with his wife) executed a deed of the land to defendant Hearse, and has put in a disclaimer of all interest in the land. The bill charges that Hearse took this deed with full notice of complainant's rights, and of Tyler's want of title; alleges that he paid nothing for the conveyance, and that he received the deed for the purpose of defrauding complainant. Hearse denies this, and sets up the defense of a bona fide purchase for a valuable consideration without notice. We are strongly inclined to think from the testi-

Digitized by Google

mony of Hearse himself, who was sworn in his own behalf, that he was well aware of the nature of the title, and of the attempted fraud of Tyler, and that he took the conveyance for the very purpose of aiding Tyler in the perpetration of the fraud upon complainant. But whether he did so or not, or whether he had full notice at the time, is immaterial. He paid nothing to Tyler at the time. Tyler was owing him, he says, about seven dollars and fifty cents, which was to apply on the purchase, and he gave him a note, not negotiable, for six hundred dollars less the last mentioned sum. This note it was understood should be paid by turning out other notes. This it is claimed was done, but not till some considerable time afterwards. Yet he admits that immediately after the sale to him he was fully informed of the nature of the title. Whatever he paid, therefore, was after such notice; and such payment, if in fact any notes of value were turned out, was made in his own wrong, and he must bear the loss: — *Warner v. Whittaker*, 6 *Mich.* 133.*

But it is objected, that complainant was not in possession at the time of filing the bill, and that, in the attempt to prove such possession, he has proved the title out of himself, and in one John L. Simonson.

Whether this bill could be sustained independent of the statute — *Comp. L.* § 3490 — we do not think it necessary to decide; as we think complainant has shown a sufficient possession to bring himself within the statute, if that be necessary.

Complainant introduced a deed executed by Lewis to John L. Simonson, bearing date the twenty-ninth day of December, 1856, one day before the levy of complainant's execution, but not acknowledged till the second day of January, 1857, the third day after the levy. In the absence of any proof of delivery prior to the acknowledgment, we must presume that it was not delivered till after the

* See also *Thomas v. Stone*, *Wal. Ch.* 117; *Dixon v. Hill*, 5 *Mich.* 404.

Digitized by Google

acknowledgment, such being the usual course and practice in reference to the delivery of deeds and other instruments intended for record as this was, and the deed being incomplete for this purpose till acknowledged. The deed, therefore, being subsequent to the levy, the only ground, if any, upon which Simonson could claim title as against the sale to complainant, would be that of a bona fide purchase for a valuable consideration without notice. But this ground could only be made available by Simonson himself, and those claiming through or under him. Hearse does not claim through the deed in any way, but in opposition to it. Simonson may have had full notice, he may have known that all he was getting by his deed was the right of Lewis in the land subject to the execution, or he may have paid no consideration, and may not choose to set up any claim on the ground of a bona fide purchase; and his subsequent conduct in reference to the attornment of Fuller, his tenant, would indicate that he did not intend to insist upon such claim. So far as defendant Hearse is concerned, the levy must be treated as binding the land from its date. He can not invoke the aid of the registry law in favor of a deed under which he does not claim, and if he could, that law would cut off all claim he might have under the deed from Lewis to Tyler, as the deed from Lewis to Simonson was prior to that, and on record long before it.

Simonson put Fuller in possession in the spring of 1857, under an agreement that the latter should work the land, pay taxes, keep up the fences, &c. Fuller testifies that he continued to occupy under Simonson until the execution of the lease made to him by complainant, through the agency of E. Gould, May 1st, 1860. By this the land was leased to Fuller "for the term of one year from the first day of August [then] next," which (Fuller being then in possession, and Simonson having agreed to his holding under the Goulds, as will presently appear) we

Digitized by Google

think must be understood as creating a tenancy from the date of the lease, and to expire a year from the first day of August then next.

Simonson's testimony was taken in February, 1862, and he testifies that more than a year before that time the Messrs. Gould—both Amos and Ebenezer Gould—had asked him if he was willing to let Mr. Fuller hold possession under them, and that he assented to his doing so. It was doubtless soon after, and probably in consequence of this assent, that the lease to Fuller was executed by E. Gould, as the attorney and in the name of Blanchard. And as it does not appear that either of the Goulds ever had or pretended to have any claim to the land in their own right, we think it is fair to infer from the circumstances of the case, that the assent of Simonson to Fuller's attornment was obtained for the benefit of complainant, and that both the Goulds were acting in his behalf, though there is no direct evidence of this. Fuller testifies that up to the time of this lease he was in possession under Simonson; that he never occupied by arrangement with Hearse, nor under Tyler.

But if the attornment had been actually made to the Goulds in their own right, the execution of the lease by E. Gould as agent of the complainant, would estop him, at least, from claiming against complainant, and have the effect to put complainant into possession of the undivided half as tenant in common with A. Gould, if nothing more, to say nothing of the improbability of E. Gould consenting to act as the agent of complainant, and as such leasing the whole property to Fuller, if either he or Amos Gould claimed any right in the property. The lease purported to be for the whole property, and the tenancy was ostensibly of the whole; but if it was rightful only for one half as a tenancy in common, still we are inclined to think such possession was sufficient to enable complainant to sustain his bill under the statute.

Digitized by Google

But it is insisted by defendant Hearse, that immediately after the thirtieth day of August, 1858, when Tyler's deed to him was executed, he, Hearse, let the land to Fuller, and that Fuller was in possession under him as tenant at the time the bill was filed. But it is clear from the testimony of Hearse himself, that when he called upon Fuller, and when this pretended letting took place, Fuller was already in possession; and from the testimony of Fuller and Simonson, it is also clear that he had been in possession over a year, and then was in possession, under Simonson. It is therefore wholly unnecessary to determine what kind of arrangement was actually made on that occasion between Hearse and Fuller as to the latter becoming the tenant of the former; since it was entirely incompetent for Fuller, without the consent of Simonson, to change the nature of his tenancy by acknowledging Hearse as his landlord. See *Byrne v. Beeson*, 1 *Doug. Mich.* 179.*

Hearse says he went to the land with Lewis and Tyler to take possession; that Fuller informed him of his holding under Simonson; that Lewis told Fuller he, Lewis, had sold to Tyler, and Tyler to Hearse, and they had come to take possession, &c. Such was the ground upon which Hearse's claim of possession was based; and the attempt to change the tenancy of Fuller by the pretended arrangement claimed to have been made there, was not only clearly fraudulent, but it shows that Hearse claimed title through Lewis, the defendant in the execution; and that his claim was therefore thus far invalid as against the levy and sale to complainant.

We think the decree of the Court below was clearly right in declaring the deed from Abram Lewis and wife to Tyler, that from Grosvenor to Tyler, and that from

* See also *Fulkner v. Beers*, 2 *Doug. Mich.* 117; *Lee v. Payne*, 4 *Mich.* 106.

Digitized by Google

Tyler and wife to defendant Hearse, void as against complainant, and in decreeing a release from defendants; and that decree must be affirmed, with costs.

The other Justices concurred.

Thomas K. Adams v. Henry M. Bradley and others.

Fraudulent grantee to hold in trust for person equitably entitled. — Two tenants in common agreed to hold separate parcels of their land in severalty, but no releases were executed. Each afterwards sold his parcel, giving a deed of the whole interest as if he had had a release from his co-tenant. A grantee of one of them sold, taking back a mortgage for the purchase price, and the other, by an understanding with the mortgagor, gave a deed to the mortgagor's brother, with the intention thereby to perfect the title conveyed by his co-tenant. A small consideration was paid for this deed, which, however, the grantor did not demand. Proceedings being taken to foreclose the mortgage, this deed was set up as a defense to one half its amount, on the ground of failure of consideration. It was held, that the grantee in the deed, under the circumstances, took it as a trustee, and the deed must be regarded as a mere release of the grantor's interest, in pursuance of the original understanding between the co-tenants.

Parties to foreclosure suit. — The grantee in this deed was held to be a proper party to a suit to foreclose the mortgage, in order that he might be decreed to make his deed properly operative as a release.

Title to land: the deeds presumed to show its actual state. — A partnership of three persons owned lands, which, however, had been conveyed to the three without any reference in the deed to the partnership. It was held that a mortgage given by one of the three on an undivided one-third of the land, to one who had no notice that it was partnership property, was not affected by the partnership equities. Such mortgagee had a right to assume that the common possession of the three was under and in accordance with the record title, and not under some other and parol arrangement.

Foreclosure suit: multiplicity of issues. — Three persons who had held land in partnership sold it, and gave separate conveyances to the purchaser, who, in pursuance of an arrangement to that effect, gave back a mortgage for the purchase price to one of them. The purchaser afterwards bought up a mortgage given by one, on an undivided one-third of the land, and sought to make a set off of this in a suit to foreclose his own mortgage. But the set off was refused, the Court holding that claims under this mortgage could be better litigated in a separate suit; and the foreclosure decree was so framed as to leave this prior mortgage untouched.

Parties to suit in equity: cestui que trust. — In a suit by a trustee to reduce the trust fund into his possession, the cestui que trust need not be made a party. Sill v. Ketcham, Har. Ch. 423; Morey v. Forsyth, Wal. Ch. 465; Martin v. McReynolds, 6 Mich. 70.

Heard April 26th, 27th and 28th. Decided May 19th.

Digitized by Google

ADAMS v. BRADLEY.

Appeal in chancery from Bay circuit. The facts appear by the opinion.

W. L. Webber and *G. V. N. Lothrop* for complainant.

J. G. Sutherland for defendant.

CAMPBELL J.:

This bill is filed to foreclose a mortgage, made by Lot Frost and Charles Bradley to complainant, in pursuance of a contract of purchase made with complainant, and George S. Lester and Mark Carrington, who shortly previous to the date of the contract had dissolved partnership.

The property mortgaged had been used by the partnership firm, under the name of Lester, Carrington & Co., and consisted of the mill property, which had been used for lumbering purposes, and of several other parcels of less value.

The mortgage was dated May 1st, 1855, and was made to Adams individually, as he was authorized to settle up the partnership concerns.

The three Bradleys answer separately. Several defenses are set up, and it will be necessary to refer to them singly, in order to make the case intelligible.

At the time when the transactions took place with Frost and Bradley, the title to one undivided half of the mill lot was defective. It had originally been owned by John P. C. Riggs and Henry Riggs, for whom their father purchased two lots, intending one for each, but having them conveyed in common. This mill lot was conveyed by John P. C. Riggs, as his own, in 1842, by title to which George S. Lester succeeded by purchase in the spring of 1854, when the lot was vacant and unimproved, and worth about one hundred dollars. This purchase was made with a view of erecting a saw mill, which was done at the expense of Lester, Carrington & Co., during the

Digitized by Google

same year. Lester, in 1854, conveyed to Carrington and Adams each one undivided third part of the lot, and they all subsequently conveyed to Frost and Bradley by separate deeds, the mortgage now in controversy being given for purchase money. Frost conveyed his interest to Charles Bradley, who conveyed the entire interest to Henry M. Bradley, December 31, 1857. In April, 1859, Henry Riggs and wife conveyed an undivided half of the mill lot to Nathan B. Bradley, who now claims to own it, and the other defendants insist that, as an outstanding and valid title to one half of the mill lot, it should procure an abatement of one half of the mortgage, on the ground of failure of consideration to that extent.

It appears clearly in the case that, in 1859, prior to the conveyance to Nathan Bradley, Henry Riggs and John P. C. Riggs came to an understanding, whereby each was to convey to the grantees of the other his undivided interest in the lots which had been theretofore conveyed, whereby Henry was to release his interest in this mill lot, and John was to release his interest in the other lot which Henry had sold. It appears that the lots purchased for John and Henry Riggs, by their father, although never actually partitioned, had been conveyed in severalty, as if they had been. In pursuance of this understanding Henry Riggs conveyed his half of the mill lot to Nathan Bradley, who represented that he wanted it to complete the title derived from John P. C. Riggs. The consideration paid was fifty dollars; which, however, was volunteered by Nathan, — Henry Riggs not requiring it — and which was really paid by Charles or Henry M. Bradley, it is not very clear which. Charles Bradley had consulted counsel about buying it, and we are satisfied it was obtained by an understanding among the defendants. As against complainant or the firm of Lester, Carrington & Co., we are satisfied this conveyance to Nathan Bradley must be held to enure to the benefit of the mortgage title. It was so

Digitized by Google

designed by Riggs, and he would not have conveyed it otherwise. Nathan Bradley took it as a mere trustee, and it must be regarded as a mere release, which he will be decreed to make operative. Any other construction would give effect to a gross fraud. He is properly made a party, for the purpose of compelling this redress.

A second defense relied upon by Henry M. Bradley, to reduce the mortgage, is a prior mortgage now owned by him, given by George S. Lester to Thomas J. Stead, of Providence, Rhode Island, December 1, 1854, upon an undivided third part of the mill premises. Complainant also seeks in his bill to have this Stead mortgage postponed to his, on the ground that the property was partnership property, and was therefore subject to all the partnership equities. The mortgage to Stead was made for a valuable consideration, and in good faith so far as actual notice is concerned. The title had, by the act of the partners, been kept separate. The original title was purchased in Lester's name, and not in that of the firm, and he subsequently deeded to Adams and Carrington separately, each an undivided third, making no reference in the deeds to any partnership arrangement.

Without undertaking to determine whether, under such circumstances, actual notice of the partnership would have affected the incumbrancer, we are satisfied that where the record shows a right to a possession as tenants in common, a purchaser or incumbrancer is authorized, without actual notice, to assume that the common possession is under and in accordance with the record title, and not under some other parol arrangement. We think this mortgage cannot therefore be postponed to that of complainant. But we are also of opinion that it can not be set off against complainant's mortgage.

The Stead mortgage is a private claim against Lester, and is a lien on nothing but the undivided third part of the property. The conveyances to Frost and Bradley were

Digitized by Google

made by each tenant in common separately, and neither Adams nor Carrington covenanted, except as to their own shares, which were unincumbered. And if any liability remains under the original contract of sale, Adams has been expressly released from it.

Henry M. Bradley must be left, therefore, to his remedy on the mortgage itself, and, as it is a prior mortgage, and the equities can not be cut off by this proceeding, the decree will, as to one undivided third part of the title, be made so as to leave this mortgage untouched. It can not be litigated in the present suit, without introducing collateral issues, which can be better disposed of separately.

The only remaining questions relate to the mortgage sought to be foreclosed in this suit.

The bill was dismissed below, because Lester and Carrington were not made parties. This bill is filed to collect a debt, and not to settle the rights of *cestui que trusts* in its proceeds. No controversy can arise here between Adams and his late partners. It has always been settled as the rule in this State, that, in a suit by a trustee to reduce the trust fund into his possession, the beneficiaries need not be brought in:—*Sill v. Ketchum*, *Har. Ch.* 423; *Morey v. Forsyth*, *Wal. Ch.* 465; *Martin v. McReynolds*, 6 *Mich.* 70.

The only remaining inquiry is concerning the amount due. Three notes were given of $2,440 14 each. The third note remains entirely unpaid. Upon the first note payments were made, which reduced the principal to $704 17. For this amount, Frost and Bradley executed, as collateral, a new note, which when paid was to apply in satisfaction. This new note was indorsed by Adams, and held by Simeon Folsom when this suit was commenced, but has since been taken up by Adams as indorser. It was objected that Folsom should have been made a party. But as Adams held the securities in his own name, the rule above referred to rendered it unnecessary. And as at the time

Digitized by Google

when this fact came out it also appeared that Adams had become reinstated as owner, it may be doubted whether, under any circumstances, an amendment would have been ordered, which had become immaterial.

The principal sum of $704 17, with interest from May 15th, 1857, remains due on the first note, making, May 1st, 1864, $1,047 17.

On June 29, 1857, the second note had been reduced down to $625 17, and was then held by the Bank of Macomb county, with Adams's indorsement. A draft was given by Bradley for $1000 which, if paid, was to cancel this balance. It was not paid, and Adams was obliged to take it up. Upon the second note there is due, therefore, $625 17, with interest from June 29th, 1857, making, May 1st, 1864, $924 45.

Upon the third note, there is due $2,440 14 with interest from May 1st, 1855, making May 1st, 1864, $4,007 42.

A decree must be entered reversing the decree below, and declaring that the title of Nathan B. Bradley is subject to this mortgage, and requiring him to release to the purchaser at the foreclosure if the property is sold under this decree. Defendants are to pay $5,979 04, with interest from May 1st, 1864, and costs of both courts, in three months, and in default thereof the property is to be sold in the usual way.

The undivided one-third of so much of the property as is covered by the Stead mortgage is to be sold subject to the lien of that mortgage. The bill to stand dismissed without costs as to Thomas J. Stead, who has no further interest, and who has not appeared. Nathan, Charles and Henry Bradley to be personally liable for costs if there is any deficiency. The decree to be transmitted to the Court below for execution.

The other Justices concurred.

Digitized by Google

Calvin Goodspeed v. Joseph Dean.

Land contract: effect of vendor terminating it. — A vendor, having, on default by the vendee, elected to treat as void a contract which he had given for the sale of lands, and having given the vendee notice to quit, must be regarded as having relinquished his right to the amount then due on the contract. He can not treat the contract as void in respect to the rights which it secured to the vendee, and valid in respect to those which it secured to himself.

Heard May 8d. Decided May 10th.

Case made after judgment from Livingston Circuit.

On April 10th, 1860, plaintiff entered into a contract with defendant to sell him a certain parcel of land for the sum of $2,100, $100 of which was to be paid down, $100 with interest on the whole February 10, 1861, and the balance in five equal annual payments, with annual interest. The contract contained the following clauses:

"In case default shall be made by the party of the second part, his heirs, executors, administrators or assigns, in any of the conditions above stipulated, to be performed by him, it shall and may be lawful for the party of the first part, if he sees fit, to declare this contract void, and to re-enter upon the said premises at any time after such default without serving on the party of the second part, or other person holding under him, a notice to quit said land.

"And in case said contract shall be so declared void the party of the second part shall henceforth be deemed a mere tenant at will under the said party of the first part, and be liable to be proceeded against in the same manner, without notice to quit, under the provisions of an act regulating proceedings in case of forcible entry and detainer and the acts amending the same; and the said party of the first part in such case shall be at liberty to sell the land to any person or persons whomsoever, without being liable in law or equity to the party of the second part, or any persons claiming under him, for

Digitized by Google

any damage in consequence of such sale, or to return any payment made on account of this contract, and payments that shall have been made may be held by the party of the first part as stipulated damages for the non-performance of this contract."

The first $100 was paid at the date of this contract. The payment due February 1, 1861, was not paid, and on the fifth of March following, plaintiff served upon defendant a notice to quit the premises. April 1, 1861, the parties entered into a new contract for the purchase by defendant of the same land, for the sum of $2,000, $400 of which was to be paid April 1, 1864, and the remainder in four equal annual payments thereafter, with interes. This contract made no allusion to the former one.

The present action was brought to recover one year's interest on the first contract. The plaintiff claimed that it was orally agreed, between himself and the defendant, that the latter would pay him the interest due on the first contract, if he could have a new contract postponing the payment of the principal. In respect to this oral contract, the evidence was conflicting.

O. Hawkins and *T. M. Cooley* for plaintiff.

G. V. N. Lothrop for defendant.

CHRISTIANCY J.:

By the first written contract the plaintiff had the option, on any default in payment, to treat the contract as void, and the defendant was thenceforth to be deemed a tenant at will; plaintiff having a right to re-sell the land without being liable to any damage in consequence of such sale, or to return any payment which had been made on the contract. Defendant having failed to pay the installment of one hundred dollars due February 10, 1861, and the interest on the two thousand dollars then due, the plaintiff elected to treat the contract as void,

Digitized by Google

and gave defendant a notice to quit. By this election we think he must be understood as having also relinquished his right to the amount then due upon the contract. He could not treat it as void in respect to the rights which it secured to the defendant, and valid in respect to those which it secured to himself. Having declared it void as to the land, it was void also as to the payments which it had bound the defendant to make for the land. There was nothing therefore upon which plaintiff could base a right of action for either the principal or the interest which had become due upon it.

He was at liberty to re-sell the land on such terms and for such price as he should be able to obtain, whether it were the same amount or more or less than the old contract had provided for.

He chose to sell the land again to the defendant, and entered into a new written contract with him to sell it for the price of two thousand dollars, which happens to be the same amount of principal which remained unpaid upon the old contract, including the one hundred dollars which had become due upon it. If by the new arrangement for a re-sale, it had been intended that the defendant should pay a sum equal not only to the principal unpaid but also the interest accrued upon the old contract, this would in effect have constituted a part of the price, and would therefore naturally have been included in the new written contract, which covered the whole subject matter of the land, the price and mode of payment.

It is true it would have been competent for the parties to have provided for so much of the price as was equal to this back interest by a separate and independent contract. But being in effect a part of the price, and therefore a part of the same subject matter as the new written contract, any verbal conversation or agreement which might have been had or made prior to or at the

Digitized by Google

same time of the new written contract, I am inclined to think must be looked upon as merged in the latter, which purports to fix the whole price to be paid. There was no written contract for the payment of this interest either before or after the new contract, and none is claimed. If a verbal contract for its payment was made after the new written contract, it might be very questionable whether it would rest upon a sufficient consideration. But it is unnecessary to discuss the effect of such oral contract, whether prior or subsequent to the new written contract, as from a careful review of the evidence we are by no means satisfied that any such verbal contract was made either before, at the time, or after the new written contract. Independent of the inferences to be drawn from the two written contracts, we think there is a strong preponderance of evidence that no such contract was made. The plaintiff's own testimony, we think, shows nothing more than a proposition on the subject which does not seem to have been at any time fully agreed upon by both parties. He says they entered into no positive bargain until they entered into the new contract, meaning the written contract. After this new contract he says the defendant offered to pay sixty dollars of this interest, and secure the balance by chattel mortgage, but this he then declined, till he should take counsel, and here the matter seems to have ended.

The judgment of the Court below must be affirmed, with costs.

The other Justices concurred.

Digitized by Google

Daniel Marvin v. Frederick Schilling and another.

Sale of lands by a guardian: defective petition: fraud.—License was granted by the Probate Court which appointed a guardian, for the sale of lands by him. The sale was made, and a deed given in pursuance thereof. It was held that, under Compiled Laws § 3092, a person claiming adversely to the title of the ward, could not contest the validity of the sale on the ground that the petition for license to sell was defective.

Nor can he contest it on the ground that the sale was a fraud upon the ward. If there is anything wrong in the proceedings, it may at the proper time be inquired into by the ward, or any one claiming under him; but a third person can not drag the ward's rights into Court in a litigation between himself and the purchaser.

Redemption by guardian.—A guardian has a clear right to redeem his ward's lands from a mortgage sale.

Administrator's right to possession of lands: ejectment by heir.—The statute—Comp. L. § 2904—authorizing executors and administrators to take possession of the lands of the deceased, does not exclude the possessory rights of the heir, but merely permits the personal representatives to claim and have possession, until a sale by them under the order of the Probate Court, or until the final settlement of the estate, if they see fit to demand it, unless ordered to deliver it over to the heir by the Probate Court. Streeter v. Paton, 7 Mich. 341.

The heir, therefore, when possession has not been demanded by the personal representatives, may maintain ejectment against third persons.

Heard April 26th. Decided May 10th.

Case made after judgment, from Tuscola Circuit. The facts are stated in the opinion.

J. G. Sutherland for plaintiff.

W. L. Webber and *G. V. N. Lothrop* for defendants:

1. The Probate Court of Tuscola county had no jurisdiction over the property.

The minor, Elizabeth, is represented as being the heir of Timothy L. Howe. She was not such directly, but only through her mother, and Thaddeus B. Howe, the son of Timothy. The interest that descended from Thaddeus to his mother was subject to his debts, and his estate was being administered in Macomb county. It does not appear that the mother died intestate. This land was the

Digitized by Google

estate of Thaddeus, and the jurisdiction of all other courts than the one first acquiring it, is expressly excluded by § 2878 of Comp. Laws.

The petition to the Probate Court for the appointment of guardian in the first instance is that he may sell the interest of Elizabeth in the land, but does not disclose any state of facts to authorize the Court to make a sale. There was no debt against the minor when the guardian was appointed, and the statute does not authorize the guardian to create one for no other reason than to enable a sale to be made. The power to license to sell a minor's estate for debts is only found in § 3076 of C. L., but we insist that statute affords no jurisdiction to order a sale on the facts set out in the petitions and proceedings in this case. There were no "just debts of the ward." No person by a voluntary payment can make himself a creditor of the minor.

All guardian sales are governed by same rules as those for executors, &c.; § 3076; and the statute, § 3070, expressly requires all such sales to be made subject to all charges on the land by mortgage, or otherwise at the time of the intestate's death. Marvin therefore could not redeem. He could only sell the equity of redemption. The order assuming to give him authority to sell the land to pay a *debt thus created*, is void.

2. Elizabeth Tong had no title subject to sale. The most she had was a contingent equity of redemption, subject to the disposition to be made of the same by the Probate Court of Macomb county; until such proceedings were finished, her rights were in abeyance.

3. The object of the whole proceeding was obviously to transfer the title to Marvin, the plaintiff, by the *forms of law*, without reference to the interests of the minor.

In effect, Daniel Marvin was the guardian and the purchaser; and the sale is void by the provisions of § 3056. If the Court finds that Daniel Marvin was the party who,

Digitized by Google

through his son, called the powers of the Probate Court into exercise, and superintended and controlled them, then the sale is *void*, not only by the statute last cited, but by the well settled doctrine of the common law: — *Ingerson v. Starkweather*, *Walk. Ch.* 350; *Dwight v. Blackmar*, 2 *Mich.* 333.

4. The title of the defendant, Schilling, through the mortgage was and is perfect. The legal title was vested in the mortgagee. It could only be divested by redemption.

If the guardian had no right to redeem, the payment of the money by him to the register was not a redemption; and if the money was taken by Schilling, it was as though taken from any other person with whom money might have been deposited subject to his order.

But whatever effect the paying of the money may have had, the plaintiff in this action must recover on the strength of his own title. He can not gain a title by showing that the defendant has none.

MANNING J.:

This is an action of ejectment for the N. 1-2 of S. W. 1-4 of Sec. 8, township 15 N. of R. 9 E.

The land was patented by the United States to Timothy L. Howe. Howe died between 1845 and 1848, leaving a widow, Olive B. Howe, and an only son and child named Thaddeus B. Howe. Thaddeus was never married, and died in 1855. Olive B. Howe, the widow, married Procter Tong, by whom she had one child called Elizabeth. She died in 1857. In May, 1858, Lucius S. Marvin was appointed guardian of Elizabeth Tong, by the Probate Court of Tuscola county, in which the land is situated, she at that time being about eight years of age, and residing with her father, in the state of New York, who applied to the Probate Court for Marvin's appointment as guardian.

Digitized by Google

Marvin afterwards applied to the Probate Court for a license to sell the land, which was granted, and it was in pursuance of such license afterwards sold and deeded by him to his father, Daniel Marvin, the plaintiff. And in June, 1857, Procter Tong released all his interest in the land to plaintiff. On the death of Timothy L. Howe the land descended to his son Thaddeus Howe, and, on his death, to his mother, Olive B. Tong, and on her death to her daughter, Elizabeth Tong, subject to her father's life estate as tenant by the curtesy (Comp. L. § 2803), if a husband can have such an estate in land acquired by his wife subsequent to the 13th February, 1855: Comp. L. § 3292.

Schilling (the defendant Beck being in possession under him) claimed the premises under a mortgage given by Timothy L. Howe to Philander Howe, on the 11th April, 1839, and assigned by the mortgagee to one Shetterley, and by Shetterley to Schilling, by whom it had been foreclosed at law, and the mortgaged premises bid in at the sale. But before the time of redemption expired the mortgaged premises were redeemed by Marvin, the guardian.

Two principal objections are made to plaintiff's recovery:

1st. Want of jurisdiction in the Probate Court granting the license to sell, for an alleged defect in the petition of the guardian for the license. The license must be granted by the Probate Court of the county in which the guardian is appointed. *Comp. L.* § 3076. The statute also provides that if the validity of a sale made by a guardian shall be drawn in question, by any person claiming adversely to the title of the ward, or claiming under any title that is not derived from or through the ward, the sale shall not be held void on account of any irregularity in the proceedings. Provided, it shall appear that the guardian was licensed to make the sale by a Probate Court having jurisdiction, and that he did accordingly

Digitized by Google

execute and acknowledge, in legal form, a deed for the conveyance of the premises. *Comp. L.* § 3092.

These were proved on the trial, viz: a license from the Probate Court of Tuscola to the guardian to sell the land, and a deed duly executed and acknowledged by him, conveying the premises to plaintiff. The Probate Court having jurisdiction was the Probate Court of Tuscola county that appointed the guardian: — *Howard v. Moore*, 2 *Mich.* 226; *Coon v. Fry*, 6 *Mich.* 506. It is immaterial, therefore, whether the petition of the guardian was one that the court should have granted the license upon or not. If it was wholly defective the irregularity is one that does not affect the title under the statute. The transactions so much dwelled upon on the argument, that the money with which the guardian redeemed the premises was loaned by him; that the license to sell was to repay the money so loaned; that the premises were purchased by and deeded to the father of the guardian, the person of whom the loan had been made, and that they did not sell for enough to repay him and cover all the expense the estate of the ward was put to, are matters that no way concern the defendants.

If there was any thing wrong in them it may at the proper time be inquired into by the ward, or any one claiming under her.

It is not for defendants to drag her rights into this Court in a litigation between them and plaintiff. The guardian had a clear right to redeem the mortgaged premises, and whether he used the money of his ward or his own, or loaned it of a third person for that purpose, is immaterial in the present suit.

2. Another objection made with a view to show title in a third person, is, that letters of administration were taken out by one Gardner Scott on the estate of Thaddeus B. Howe, and that the estate had not been settled.

The statute provides that administrators shall have a

Digitized by Google

right to the possession of all the real estate, as well as personal estate, of the deceased, and may receive the rents, issues and profits of the real estate, until the estate shall have been settled, or until delivered over by order of the Probate Court:—*Comp. L.* § 2904. In *Streeter v. Paton* we had occasion to consider the effect of this statute on the rights of the heir, and came to the conclusion that the statute did not interfere with the descent of the real estate to the heir, and his right to take possession, or bring ejectment therefor against any one except the administrator, or some one in possession under him. And that the object of the statute was to permit the personal representative of the deceased to take possession of the real estate, and hold it until it should be sold by him under a license of the Probate Court, or the final settlement of the estate, if he thought proper to do so, unless ordered to deliver it over to the heir by the Probate Court.

The judgment below must be affirmed, with costs.

MARTIN CH. J. and CAMPBELL J. concurred.

CHRISTIANCY J. did not sit in this case.

Chauncey P. Ives v. The Bank of Lansingburgh.

Land contract: effect of release by vendee. — Where the vendor in an executory contract for the purchase of lands receives from the vendee a quit claim deed of the lands, this is a rescission of the contract; and he can not afterwards maintain an action on notes which were given for the purchase price.

Principal and surety: release of surety by discharging securities. — Where the vendor in a land contract had taken notes payable to his own order for the purchase price, which notes he indorsed to a bank, and at the same time gave the bank a deed of the lands as security for the payment of the notes, and the bank afterwards took from the vendee a quit claim deed of the lands, without the vendor's knowledge, it was held that such deed was a rescission of the contract, and that the vendor was thereby discharged from his liability as indorser of the notes, at least to the extent of the value of the land.

Digitized by Google

IVES v. BANK OF LANSINGBURGH.

An agreement between the vendee and the bank, at the time of the delivery of the quit claim deed, made without the knowledge of the vendor, that such deed should not affect the liability of the vendee on his notes, would not prevent its having this effect upon the rights of the vendor as indorser. To make such an agreement binding upon him, he should have been made a party to it.

Heard April 29th. Decided May 17th.

Error to St. Joseph Circuit.

The Bank of Lansingburgh sued Ives on three promissory notes, dated August 12, 1857, for $1,066.66 each, payable respectively in three, four and five years from date, with ten per cent annual interest, all given by A. F. Bell, payable to the order of Ives, and by him indorsed. Two of these notes were past due, and four years interest on the other, when suit was brought.

Upon the trial, the defendant (below) gave evidence tending to show that said notes were given to him by A. F. Bell, in purchase by contract of certain lands which the defendant owned in Clinton county, Michigan; and that, by the terms of said contract, he was to convey said lands to said Bell, upon the payment by him of said notes; that at the time he, said defendant, had indorsed said notes over to said bank, he gave said bank a warranty deed of said land, subject to the rights of said Bell, under his said contract, and at the same time he transferred to said bank land certificates for fifteen hundred acres of land, and took from said bank an agreement to re-convey said lands, and re-assign said certificates, on the payment of said notes. The defendant introduced further evidence, tending to show that the said bank, without the knowledge or consent of the defendant, on the eighth day of February, 1862, procured from Bell and his wife a quit claim deed of all their right and interest in the lands for which said notes were given; and he also introduced the depositions of said Bell, and of one Jacob Baker, tending to show that the bank had obtained a judgment against said Bell on two of said notes, and

Digitized by Google

tending to show the value of said lands to be equal to the amount of said notes.

The plaintiff put in evidence the depositions of the president and cashier of said bank, tending to show that they purchased said notes from defendant; that a payment of one year's interest on each of said notes had been made by said Bell to said bank, since their indorsement over to said bank; and also that the judgment so recovered by said bank against said Bell for a portion of said notes, had not been satisfied or discharged, in whole or in part, and that the deed from Bell to the bank was procured for the purpose of obtaining a release of all Bell's rights in the said lands under said contract. The plaintiff also gave in evidence the testimony of said president and cashier of said bank, tending to show that the original deed of said Ives to said bank was taken by way of security for Ives's indorsement of said notes, and not as an absolute purchase of said lands; and that the release of said Bell's interest in said lands was not to affect his liability on said notes or the judgment recovered thereon.

The defendant's counsel then requested the Court to charge the jury, that the conveyance from Bell and wife to the bank, of February 11th, 1862, of the lands therein described, operated in law as a payment of the judgment and notes against Bell, and as a discharge of his contract for the purchase of said lands, and that the defendant was thereby discharged on his liability as an indorser upon said notes, at least to the extent of the value of said lands. The Court declined so to charge, and defendant excepted.

The counsel for the defendant further requested the Court to charge the jury, that the bank, by taking a deed from Bell of the lands for which said notes were given, without the knowledge or consent of the defendant, thereby discharged the defendant from his liability as indorser on said notes, at least to the extent of the value of said

Digitized by Google

lands. The Court refused so to charge, but did charge that the taking of the deed of the lands by the bank, from Bell, in the manner and under the circumstances stated, did not affect or destroy their claim against the defendant as indorser of said notes; to which refusal to charge and to the charge so given, the defendant excepted.

The jury, under the charge, returned a verdict for the plaintiff.

Maynard & Meddaugh, for plaintiff in error:

The facts show clearly:

1st. That the conveyance by Bell to the bank was not paid for by the bank, and that its object and purpose was simply to obtain from Bell a release of all his rights in the land under the contract.

2d. That the bank stood in place of Ives as to the contract in all respects.

We say therefore that the legal effect of the deed was to release Bell.

That the vendor of property by taking it back from the vendee thereby rescinds the contract of sale, and discharges the vendee from liability under it, is a proposition that will scarcely be denied:—1 *Hill*, 511; 35 *Miss.* 559; 5 *Seld.* 536; 26 *Vt.* 624; 20 *Vt.* 538.

3d. By the release of Bell, the maker of the notes, Ives, who was liable only as indorser, was also discharged: —*Edw. on Bills*, 291–5. An indorser is treated as surety to the maker so far as this question is concerned:—3 *Barb. Ch.* 41.

4th. The bank, by procuring the deed from Bell, and thereby releasing him, cancelled the contract between him and Ives, and deprived Ives of its advantages. The bank held this contract as one of the securities placed in their possession by Ives, and they were bound to return it to him upon his paying the debt.

It is well settled that if a creditor surrenders up or

Digitized by Google

releases any securities of the principal, he thereby discharges the principal to the value of such securities: — 8 *Pick.* 121; 2 *Am. Lead. Cas.* 343.

It can make no difference that the securities are placed in the hands of the creditor by the surety. The principle upon which the rule is based is the same, and the rule must remain the same.

In this case, by the act of the bank, the notes were discharged, and their value to Ives thereby lost.

It is no answer to say that, by paying his indebtedness to the bank, Ives was entitled to the land.

D. B. Duffield and *G. V. N. Lothrop* for defendant in error:

1st. The release by Bell to the bank could not operate, in law, as a payment of Bell's notes, or of the judgment recovered on them. The notes were negotiable; the bank bought them absolutely before they became due, and took security.

Their claim against Bell was perfect. It did not depend on any collateral contract or equities between Bell and the defendant. As long as the acts of the bank only tended to make their security more simple and perfect, and not to change its character as security, it is difficult to see what color there is to claim that such acts operate as payment.

The Court was asked to declare that these acts operated as *a payment*. Strict *payment* can only be made by money, or something which commercially represents it; as bank bills, checks, etc., of which there was nothing here shown. But there is no payment between the parties without an agreement express, or such acts as would imply an agreement to that effect: — 2 *Greenl. Ev.* §§ 516, 526.

So there can be no accord and satisfaction without an agreement to that effect, express or implied: — 2 *Pars Cont.* 193, 197; 2 *Greenl. Ev.* § 516.

Now, this bill of exceptions not only does not disclose

Digitized by Google

any evidence tending to show any such agreement for *satisfaction*, but discloses evidence directly to the contrary.

It then stands thus: Bell releases to the bank, in the manner expressed in his deed, both understanding and intending that it should not discharge his personal liability.

Yet the Court is asked to declare, as a matter *of law*, that between themselves such discharge took effect *in spite* of their agreement and intention!

2d. In the next place, the Court was asked to declare that, as a matter of law, this release, being without the knowledge and consent of defendant Ives, discharged him as indorser, in whole or in part.

This request would be bad as assuming a fact which would have to be left to the jury.

But supposing there was no controversy about that fact, then we ask on what ground this discharge is claimed? It can not be because the debt of Bell is paid or satisfied, for that we have seen is not so. The debt is yet in full force against Bell.

Has any change been made in the condition of the parties or securities which does or can, operate to the detirment of the indorser? Let him show how; no time has been given; no portion of the security released; nothing done except that which may make the security more valuable.

Would Ives have been prejudiced by taking further security from Bell?

If so, then he may claim to be prejudiced here; for if this release operated at all, it was to give new value to the security.

MANNING J.:

We think the Court should have charged as requested, that the taking of the quit claim deed from Bell was a

Digitized by Google

rescission of the contract by which he had purchased the land of Ives.

Bell had purchased the land of Ives, and given the notes in question in payment, and was to receive a deed on paying the notes. Ives indorsed the notes to the bank, at the same time giving the bank a warranty deed of the land subject to Bell's interest therein under the contract.

The bank afterwards took a release from Bell of his interest in the land under the contract. Had Ives before he parted with the notes and land taken such a release from Bell, I think, from the authorities and on principle, that it would have been a rescission of the contract, and that Ives could not afterwards have sustained an action against Bell on the notes that were the consideration of the contract. See *Coon v. Reed*, 1 *Hilton*, 511; *Porter v. Vaughn*, 26 *Vt.* 624; *Arbuckle v. Hawks*, 20 *Vt.* 538.

The bank having succeeded to all the rights of Ives, stood in his place, and what would have been a rescission of the contract between Bell and Ives before the latter transferred his interest in the contract and land to the bank, would be a rescission of it between Bell and the bank after the bank became the owner of the notes and land. It is said, however, and the bill of exceptions states there was evidence tending to prove it, that there was an agreement between Bell and the bank, at the time the release was given, that Bell's liability on the notes should continue. But Ives was not a party to the agreement, and therefore can not be affected by it. His only liability on the notes was that of an indorser, and to make the agreement binding on him, he should have been a party to it.

The agreement was evidently made to parry if possible the legal effect of the release to annul the contract.

If Bell and the bank did not understand the release

Digitized by Google

would or might discharge Bell's liability on the notes, why was the agreement entered into?

If Bell had gone to the bank with the money to pay the notes, and, after handing it over and before the notes were delivered to him, had turned around and said to the bank, "let me have the money sixty or ninety days longer, and you may retain the notes, and I will agree my liability on them shall continue,"—would Ives, the indorser, have been bound by such agreement?

Could the bank thereafter have sustained an action against him as indorser? I think not. The legal effect of such a transaction would have been a payment of the notes as to Ives. He could not have been bound by the agreement between Bell and the bank; neither is he by their agreement in the case before us. The judgment must be reversed, with costs, and a new trial ordered.

The other Justices concurred.

Thomas Cuddy and another v. John S. Major and others.

Damages against vendor for refusal to complete sale.—Plaintiffs bought hogs of defendants, paying ten dollars down, and were to pay the balance on delivery. Defendants refused to deliver, and plaintiffs sued. The market value of the hogs, at the time of the refusal, was no more than plaintiffs were to pay. Plaintiffs on the trial claimed to recover a loss which they had sustained by reason of not having the hogs to ship with others then on hand, upon cars hired by them for the purpose after the purchase was made; but it was held that, as the contract of sale was not made with reference to any such extraordinary liability, the plaintiffs could only recover the ten dollars paid and interest thereon.

To create such extraordinary liability, there must, in every case, be something in the terms of the contract, read in the light of surrounding circumstances, which shows an intention on the part of the vendor to assume an enlarged engagement, a wider responsibility than is assumed by the vendor in ordinary contracts for the sale and delivery of merchandise. Clark v. Moore, 3 Mich. 55.

Digitized by Google

CUDDY v. MAJOR.

New trial refused: error can not be assigned — Error can not be assigned on the refusal of the Circuit Court to grant a motion for a new trial. Bourke v. James, 4 Mich. 336.

Heard May 3d. Decided May 17th.

Error to St. Joseph Circuit.

The action was brought for a refusal to deliver thirty-three hogs, bought by defendants in error of plaintiffs in error, and to be delivered at Three Rivers. Ten dollars of the price was paid down, and the balance was to be paid on delivery. The evidence showed that the price that was to be paid for the hogs was $3 per hundred, live weight, and that this was the market value at the time of the refusal to deliver. The plaintiffs below were then allowed, notwithstanding the objection of defendants, to give evidence tending to show that after the purchase and before the time for delivery, they had contracted for three cars to take hogs to New York; that they had an insufficient number to fill them, and that by reason of the failure of defendants (below) to deliver, they were obliged to send the cars on without being filled, paying therefor the same freight as if they had been full.

The Circuit Judge charged the jury, among other things, that in the absence of evidence, the jury can not presume that the defendants contemplated a wider responsibility than is assumed by vendors in ordinary contracts for the sale of property; namely, the difference between the contract price and the market value of the hogs on the day of delivery, at Three Rivers. Also that the plaintiffs could not recover for the use of the cars, unless the defendants, at the time they made the contract, had notice that the plaintiffs bought them to ship to New York, and for the purpose of filling their cars.

The jury rendered a verdict for plaintiffs of $89.

P. Eaton, Riley & Shipman, and *G. V. N. Lothrop*, for plaintiffs in error, referred to 1 *Denio*, 602; *Ibid.* 317 *and* 606; *Clark v. Moore*, 3 *Mich.* 55.

Digitized by Google

W. Allison, *G. H. Mason*, and *E. Y. Swift* for defendants in error, cited 5 *Wend.* 535; 4 *Barb.* 261; 6 *Barb.* 423; 11 *East*, 232; 12 *East*, 494; 8 *Barb.* 424; 3 *Mich.* 55; *Sedg. on Dams.* 59, 273.

MANNING J.:

This case comes within the decision of this Court in *Clark v. Moore*, 3 *Mich.* 55, where the Court say, in regard to the recovery of special damages for the breach of a contract of sale for the delivery of goods, that "to create such extraordinary liability, there must, in every case, be something in the terms of the contract, read in the light of surrounding circumstances, which shows an intention on the part of the vendor to assume an enlarged engagement, a wider responsibility than is assumed by the vendor in ordinary contracts for the sale and delivery of merchandise." The evidence shows that the cars by which the vendees intended to send the hogs to New York, had not been hired of the railroad company when the contract was made for the hogs, so that there is not the shadow of a pretext for saying the parties could have had in contemplation damages the vendees might sustain by reason of not having the hogs agreed to be sold to complete the loading of such cars. We see nothing objectionable in the charge of the Court. The charge was well enough. The error on the part of the Court consisted in admitting the evidence on which the jury acted in assessing damages, after it had been objected to by defendants. On this ground the judgment must be reversed. The verdict is so clearly contrary to both the charge and the evidence, that the Court should have set it aside and granted a new trial. But we have nothing to do with that. The motion for a new trial forms no part of the bill of exceptions, strictly speaking, and error can not therefore be assigned upon it. The jury assessed the damages at

Digitized by Google

$89. All they should have assessed them at was the $10 paid on the making of the contract, with interest, as hogs were worth no more in the market on the day they were to be delivered than the price agreed to be paid by the contract.

Judgment reversed, with costs, and new trial ordered.

The other Justices concurred.

Henry G. Sleight and another v. David Henning and others.

Evidence: admissibility of declarations. — Replevin for certain barrels of apples. Defendant claimed a part of them. It became a question whether these could be distinguished from the rest; and the question of title was also material. On the trial, the defendant, being a witness, was asked whether, at the time the writ was served, his agent pointed out to the officer the apples he claimed to have bought for defendant; to which question he replied; "He did: he pointed out two rows, and said, 'these are the apples which [defendant] purchased yesterday.'" Held, that both question and answer were competent, not to establish defendant's title, but as tending to show whether there was such a confusion of goods that the officer was justifiable in taking possession of more apples than belonged to the plaintiffs.

Juror disqualified: objection made too late. — Where a party is informed during the progress of the trial that a juror is disqualified, but he omits to object until after verdict, on the ground that evidence of the disqualification is not sooner accessible, he will be held bound by the verdict. Bourke v. James, 4 Mich. 336.

Verdict: putting informal finding into shape. — Juries rarely give very formal verdicts; and inquiries of the jurors in Court, and amendments for the purpose of putting in due form what the jury mean by their finding, are unobjectionable.

Party not injured can not complain of error. — A plaintiff in replevin can not complain that the Court awarded nominal damages to him when the jury gave none; the error, if any, being in his favor.

Heard May 3d and 4th. Decided May 17th.

Error to Washtenaw Circuit, where plaintiffs in error brought replevin against Henning, Wandlass and Hoops, for a quantity of apples. The case is stated in the opinion.

Digitized by Google

Norris & Ninde, for plaintiffs in error:

It was error to allow the question put to Orange Webster, and his answer thereto.

1. It was hearsay:—15 *Johns.* 239; 17 *N. Y.* 131; 4 *Yerg.* 210; 14 *N. H.* 113, 114. And it was not the best evidence.

2. The plaintiffs in error did not waive their right to object to the juror Saxton, because the affinity was not known at the time the jury was impanneled, nor until the evidence was all in; and was not *established* until the motion for a new trial.

3. The jury on the trial below did not pass upon all the issues contained in the pleadings; nor find all the facts required by the statute and practice.

They did not dispose of 738 barrels of apples replevied. They did not assess the value, nor pass upon their detention, nor determine the right of property therein, nor the right of possession thereto.

Nor did they assess the damages of the plaintiffs. *Comp. L.* §§ 5030, 5032.

The issues made by Hoops and Wandlass were not *legally* disposed of:—4 *Johns.* 213; 4 *Humph.* 492; 2 *Wheat.* 221; 6 *Humph.* 45.

4. There was error in receiving, altering, recording and amending the verdict given in, in writing, by the jury:—7 *Halst.* 352; 1 *Gilm.* 333; 11 *Pick.* 501; 8 *Geo.* 201; 24 *Geo.* 454; 10 *Ired.* 153.

After the verdict has been recorded and the jury dismissed, it can not be altered:—2 *Me.* 37; 2 *Nott & McC.* 441.

As to the power of the Court to "work the verdict into form," see 7 *Halst.* 352; 2 *McLean*, 612; 8 *Pick.* 415.

Digitized by Google

G. V. N. Lothrop, for defendants in error:

1. The objection to the question put to Henning, and to his answer, is untenable.

The objection was to proof of the fact *by Henning*, instead of by Webster, who pointed out the apples. But the fact to be proven and actually proved, was the *fact of notice* to the officer. This could be shown by any one who knew the fact: — 1 *Greenl. Ev.* §§ 100, 101.

2. The second error, founded on the affinity of one of the jurors to Henning, is equally untenable. The fact of affinity is not properly any part of the record. Nothing on the point appeared at the trial. The question came before the Court only on the motion for a new trial; and I do not understand that such matters can be excepted to, put in a bill of exceptions and revised in error.

It is really an attempt to bring error on the determination of a motion for new trial: — *Dibble v. Rogers*, 2 *Mich.* 406; *Chaffee v. Soldan*, 5 *Mich.* 242; 20 *How.* 29; 20 *How.* 448.

This objection of affinity, if anything, was a cause of principal challenge, And this must be made by a party before the jury is sworn in chief, or the *right* of challenge is gone: — 1 *Chit. Cr. L.* 545; 3 *Jones* (*Law*,) 443; 18 *Geo.* 194; 10 *Pick.* 480. And this challenge, when made, becomes a part of the record, and may be reviewed on error: — 7 *Cow.* 121. And when the party omits to make his challenge, or to inquire, before the jury is sworn, whether cause for challenge exists, the Court will not arrest judgment: — 20 *Conn.* 87.

Though the right of the party to challenge is gone, yet, if he discovers before verdict a cause of challenge, he may apply to the Court to inquire into the facts, and, in their discretion, stop the trial and discharge the jury: — 1 *Curtis, C. C.* 23.

And when the party has failed to inquire whether a

Digitized by Google

cause of challenge existed, or has omitted to take the objection till after verdict, he will not ordinarily be heard on a motion for new trial even:—8 *B. & C.* 417; 14 *Mass.* 205; 1 *Pick.* 43; 11 *Pick.* 269; 11 *Pick.* 467; 2 *Met.* 560; 39 *N. H.* 406; 3 *How.* (*Miss.*) 27; 1 *Scam.* 128; 15 *Penn.* 236.

This Court has applied the doctrine of waiver to challenges; as, where the challenging party refused to demand triers, the Court said he had waived his right:—*People v. Doe*, 1 *Mich.* 455.

3. The third assignment of error is not that the verdict does not support the judgment. It is that the jury did not pass on all the issues, or find all the requisite facts.

This assignment of error is not according to the fact of the record. The verdict itself must be looked at, and is conclusive on this point. "The finding of the jury is not properly a part of the bill of exceptions, and the record cannot be helped by it":—13 *Wend.* 432; 21 *Wend.* 19.

All the issues requisite under our system of pleading and practice are passed on. The statutory declaration is simply that defendants "unlawfully detained," etc. The plea in the case is simply the general issue.

It is true that this puts in issue not only the detention, but plaintiff's property and right of possession. And I suppose, the objection here is that the title of plaintiffs is not found.

But under the above pleading, a finding by the jury that the defendant "did *unlawfully* detain," is sufficient to entitle the plaintiffs to recover. Whether the property was in the plaintiffs need not be passed on.

It is like a general verdict in assumpsit, that the defendant "did promise and undertake," etc., although there are many issues involved under the general plea, beside the original promise:—9 *Mass.* 316; 14 *Johns.* 86.

Digitized by Google

This form of verdict is sanctioned, I think, by uniform practice with us. *Vide forms, Green's Pr.* 151–2.

But the defect in the finding, if one existed, is not one of which the *plaintiff* can complain. The judgment which would be authorized by a perfect finding has been entered in his favor. If the defendant does not complain, no one else can: — 16 *Conn.* 436; 17 *Wend.* 434; 8 *Watts & Serg.* 391; 5 *Blackf.* 267; 13 *Ohio*, 131; *Minnesota Co. v. National Co.* 11 *Mich.* 187; *Brigham v. Gurney*, 1 *Mich.* 349; *Berry v. Lowe*, 10 *Mich.* 11.

4. The Court below may record verdicts in such form as will effect the meaning of the jury; if erroneously recorded, the Court may amend it; and a judgment will not be arrested or reversed for any irregularity in this regard.

The remedy is by motion to set aside the verdict; and if right is not obtained on such motion, to correct the wrong by mandamus: — 1 *Cl. & F.* 224; 21 *Wend.* 40; 6 *Hill*, 289; 11 *Met.* 504; 6 *Wend.* 278.

CAMPBELL J.:

Plaintiff brought replevin for a quantity of apples, and 894 barrels were seized upon the writ. It became a question whether certain apples included in this amount, and which were bought on one day, could be identified and distinguished from the rest; and the question of title also became material. The defendant Henning was a witness, and claimed title to a portion of the apples replevied. Having testified that he was present when the apples were replevied, he was asked whether one George Webster at that time pointed out to the sheriff the apples which said Webster claimed he had bought for witness; to which question he replied, "He did, he pointed out two rows, and said, these are Henning's apples which he purchased yesterday." The question and answer were both objected to as hearsay and incompetent.

Digitized by Google

We think it was entirely competent to show what took place during the levy, tending to show whether the sheriff was justified in taking possession of more apples than were owned by the plaintiffs. In case of a confusion of goods the right of possession is somewhat different from that existing in other cases, and if defendant or his agents took steps to enable the sheriff to distinguish the property, the fact was important. It is difficult to see how the question could be improper. It was not put to show title, but simply to show that a claim of title was made for the purposes of identification upon the levy; and for that reason was unobjectionable. Nor do we see how it could be answered without showing what was said on that occasion. We can not imagine that any jury would be led to finding title, in favor of any one, upon a mere assertion. Nor is there the remotest probability that a court would submit a case to them in such a way as to allow any such misapprehension. Cases very often arise where evidence is admissible of the claims and assertions of parties concerning the title of things in controversy, where the jury may know the parties, and believe in their veracity, but it would lead to no good result to hold any such proper testimony inadmissible, from a fear that the jury can not distinguish between the various issues, and are subject to a possible risk of mistaking its bearing.

It appears by the bill of exceptions, that after the case was all put in, plaintiffs' counsel were informed by some bystander, that one of the jurors was incompetent, by reason of affinity to Henning. No step was taken to ascertain the fact, and it was not brought to the notice of the Court. A motion for a new trial was afterwards made upon this ground upon affidavits showing that proof of the fact had not been before accessible. The Court overruled the motion. The case is within the principle of *Bourke v. James*, 4 *Mich.* 336, where it was held that a refusal of a new trial was no ground of exception, and

Digitized by Google

that it was the duty of a party to make his objection as soon as informed of the juror's disqualification.

It is also assigned for error, that the verdict was improperly received and entered. When the jury came in they found as follows: "We find that Henning is the only defendant. We find for the defendant 156 barrels at two dollars — three hundred and twelve dollars." The evidence showed the replevin of 894 barrels by the plaintiff. It being suggested that the verdict did not dispose of the balance, the foreman said they found that the remainder belonged to the plaintiffs. One of the jury thereupon intimated that he did not so understand it. Some conversation then occurred between Court, counsel and jury, when he nodded his assent, and the verdict was entered accordingly, in favor of Henning for his portion, and against him for the rest. An amended verdict was afterwards entered in form, finding Wandlass and Hoops not guilty, and in other respects corresponding with the first verdict. Neither of them assessed any damages against Henning. Judgment was entered upon the verdict, giving the plaintiffs six cents damages, and costs of suit to be taxed.

Without now inquiring whether we have any authority, as the case stands, to inquire into the propriety of the amended verdict, we think it expresses what it is evident the jury meant by their finding. Although not technical, it was entirely intelligible. Neither do we perceive any impropriety in the inquiry made of the jury as to what they found concerning the apples not belonging to Henning, nor in the method by which the assent of the juror was given, who at first was confused about the question. Jurors rarely give very formal verdicts, and such inquiries in open court are often necessary to obtain express explanations of what may generally be implied. Nor do we deem it necessary to consider whether a jury must give nominal damages to a plaintiff, against whom substantial damages

Digitized by Google

are recovered by defendant. The judgment has given them, and if erroneous, because not sustained by the verdict, it is not an error which can do plaintiffs any harm, but, on the contrary, it is in their favor.

There are no errors in the record. Judgment must be affirmed, with costs.

The other Justices concurred.

Augustus P. Tucker and another v. William P. Mowrey.

Sale on Sunday. — A contract of sale made on Sunday is void; and the vendor may, on a subsequent day, tender back the purchase price, and recover his property by replevin if it is not restored on demand.

Heard April 28th. Decided May 17th.

Error to Branch Circuit.

The action below was replevin by Mowrey against the plaintiffs in error, for a horse which had been sold by him to one of them on Sunday. The rulings of the Court below sufficiently appear by the opinion.

T. M. Cooley, for plaintiffs in error, cited *Adams v. Hamell*, 2 *Doug. Mich.* 73; 15 *N. H.* 577; 12 *Met.* 24; 1 *Hill*, 76; 2 *Sandf.* 318; 19 *Barb.* 581.

W. A. Moore, contra, referred to 19 *Vt.* 358; 6 *Bing.* 653; 3 *B. & C.* 232; 10 *Ala.* 556.

CHRISTIANCY J.:

Can the vendor of property sold and delivered on Sunday, by tendering to the vendee the consideration received, recover back the property as if no such sale had been made?

Digitized by Google

The Court below charged the affirmative of this proposition; and if correct, the judgment must be affirmed. The statute (*R. S. of* 1846, *Chap.* 43, *Sec.* 1; *Comp. L.* § 1574) provides that "No person shall keep open his shop, warehouse or workhouse, or shall do any manner of labor, business or work, except work of necessity or charity, on the first day of the week; and every person so offending shall be punished by a fine not exceeding ten dollars for each offense."

It was held in *Adams v. Hamell*, 2 *Doug. Mich.* 73, that this statute rendered void a contract made on Sunday for the exchange of horses, and a note given for the difference.

This decision we fully approve. The statute not only makes it a penal offense, but takes away the legal capacity of the parties to make a contract on that day. And whether the supposed contract has been executed or remains executory, we think the rights of the parties are to be determined in the same manner as if no such contract had ever been made. The contract as such can neither be set up as the basis of an action, nor as a ground of defense. If it be a contract of sale accompanied by payment and delivery, as supposed in the present case, no property passes, and the vendor, by tendering back what he has received, may reclaim the property, and the vendee, on tendering back the property, may recover the money or property given in payment or exchange, as if no pretence of such contract existed.

Whether the action could be sustained without such tender, is a question which does not arise in this case, and we therefore express no opinion upon it. But being utterly void, the contract is incapable of ratification.

Doubtless the subsequent acts and assent of the parties may be such as to create a new contract, but they can not ratify that which is void. And perhaps the acts and conversations of the parties on Sunday, in reference to a

Digitized by Google

contract, might be shown as explanatory of their subsequent acts and conversation tending to show a new contract.

As a general rule, courts of law have left the parties to an executed illegal contract in the positions in which they have placed themselves, refusing to aid either of them, when equally in fault. But this is a question purely of public policy, and consequently there are exceptions to the rule. Courts should give or refuse their aid as the one or the other course will be most likely to discourage such contracts, and to promote the public welfare. The illegality here in question is of a peculiar kind. The contract is not illegal in respect to the consideration, or the thing done or agreed to be done; these are neither immoral nor forbidden by law. The illegality consists wholly in making the contract on a particular day. This suit is not brought to enforce the contract, but in disaffirmance of it. And we think it much more in accordance with sound public policy to treat the contract as utterly void, and to allow the plaintiff, by tendering back what he has received (or doing what is in his power to place the vendee *in statu quo*), to recover back his property, than to refuse him a remedy, and thereby to affirm the contract as valid. To refuse all remedy in such cases would be to open a wide door to fraud. It would operate, not only as a trap to the ignorant and unwary, but as a direct encouragement to swindling. We do not apply this remark to the parties or the transaction in the present case; for the transaction may have been entirely honest: but we can not fail to see that if all remedy were refused in such cases, a shrewd and dishonest man, knowing his victim could obtain no legal redress, might, by fraudulent representations, or by tempting offers which he could well afford to make, obtain money or property to any extent without consideration or liability to pay.

One object of the statute was to prevent the making of contracts on Sunday; but to refuse to sustain an action

Digitized by Google

to recover back property sold on Sunday, would be offering a premium to the dishonest to make their contracts on that day.

The rule we have adopted takes away from all parties this temptation. We think, therefore, there was no error in the charge of the Court upon this point: and this disposes of the case. The judgment of the Court below must be affirmed, with costs.

The other Justices concurred.

Nathaniel P. Jacobs v. Frederick A. Stokes.

Prohibitory Liquor Law: suit to recover money paid for liquors.—The statute —Comp. L. § 1662—authorizing moneys paid for liquors to be recovered back, is aimed at sales in the ordinary sense of the term, where the title passes from one owner to a new and different one; and not to releases on the dissolution of a partnership.

It was accordingly held, that where one partner purchased of his co-partner the interest of the latter in the partnership stock, he could not, under the statute, recover back the money paid for such interest.

Although the Prohibitory Liquor Law avoids all contracts the consideration of which, in whole or in part, consists of liquors sold in violation of the statute, yet if a purchase includes other articles besides liquors, and has been paid for, the statute does not authorize a recovery by the purchaser beyond the amount actually paid for the liquors.

Submitted on briefs May 17th. Decided May 24th.

Error to Wayne Circuit. The facts appear by the opinion.

D. C. Holbrook, for plaintiff in error, contended that the statute authorizing a recovery for money paid for liquors, did not apply to the case of one partner buying out the interest of his co-partner in the joint stock: and that the recovery for other goods besides liquors was not warranted by anything in the statute. Also, that plaintiff

Digitized by Google

should have offered to rescind the contract and restore the goods before bringing suit to recover the consideration paid therefor.

A. Russell, for defendant in error:

A sale or transfer of property from one partner to another does not differ from a similar transaction between parties not standing in that relation:—*Story on Part.* § 373; *Col. on Part.* § 884.

It is true, a sale of this kind passes only the interest of the retiring partner; but what more does any sale effect than to transfer the interest of the vendor? It can make no difference whether this interest embraces the whole title or an undivided portion.

The plaintiff is entitled to recover the whole of the money paid, without deducting that portion paid for groceries.

There was one entire contract for the sale of the whole stock.

The statute expressly provides that all agreements, the consideration whereof, either *in whole or in part*, shall have been the sale of prohibited liquors, shall be utterly null and void. And even if the statute had been silent, the maxim "void in part, void *in toto*," would apply to its fullest extent. If any part of the entire consideration for a promise be illegal, whether by statute or common law, the whole contract is void:—1 *Pars. Cont.* 380 *and cases cited*; *Wesleyan Seminary v. Fisher*, 4 *Mich.* 526; *Story on Notes*, § 190; 28 *Vt.* 308; 9 *N. H.* 196; 2 *Gray*, 258.

Defendant could only avail himself of this defense by showing that a separate price had been affixed to each article, and a distinct consideration paid.

Every dollar paid generally on this contract, without appropriation by either debtor or creditor to the groceries, has for its consideration liquor in part. The law will not

Digitized by Google

apply any payment to the groceries to shield defendant from the consequences of an illegal act.

The rule that the Court will aid neither where an illegal contract is executed, does not apply, for our statute treats the buyer as innocent. It is not made an offense to buy:—14 *N. Y.* 94, 163, *and cases cited.*

CAMPBELL J.:

Stokes sued Jacobs for the purpose of recovering back money paid to him on an alleged illegal purchase of liquors. Evidence was introduced to show that the parties owned the stock of groceries and liquors as partners, and that the purchase was simply the buying out by Stokes of the partnership interest of Jacobs in the entire business.

The Court below was asked to charge, that, if this was the real nature of the transaction, the plaintiff below could not recover. The Court refused this, and charged that if such were the case he could recover.

We think the Court erred in so deciding. The purchase by one partner of the interest of his co-partner creates no transfer of the entire property at all like that where, by the sale, a new party becomes vested with the title. It creates the same sort of title which would arise upon the death of a partner by survivorship of the other. No new person is introduced into the ownership.

The statute is aimed at sales in the ordinary sense of the term, where title passes from one owner to a new and different one; and not to releases upon the dissolution of a partnership. None of the mischiefs aimed at by the law can arise from such transfers.

Plaintiff below was also held entitled to recover, not only the price of liquors, but also the price of other groceries, purchased and paid for at the same time. This question only becomes material in the absence of any partnership.

The statute avoids all contracts the consideration for

Digitized by Google

which, in whole or in part, consists of liquors sold in violation of law:— *Comp. L.* § 1662. But by the same section the right to recover back payments includes only "payments *for such liquors* hereafter sold in violation of law." No money therefore can be recovered except such as has been paid for liquors illegally sold.

The plaintiff was bound to show how much money he had paid for the liquors.

Judgment must be reversed, with costs, and a new trial granted.

MARTIN CH. J. and CHRISTIANCY J. concurred.

MANNING J. was not present at the decision.

Pierre Teller v. Henry Willis.

Statute of Limitation: Writ of error. — The statute limiting the time for bringing writ of error, commences running from the rendition of the judgment, and is not affected by the settlement of exceptions afterwards.

Settlement of exceptions after error brought. — A party is not obliged to wait until his exceptions are settled before suing out his writ of error. The exceptions, if sealed and filed after error brought, may be brought up like any other omitted portion of the record.

The Supreme Court will always give a plaintiff in error the benefit of his exceptions, — unless by his fault or laches he has occasioned the delay himself — by extending the time for return, or for the assignment of errors, or by allowing a new assignment, as the case may require.

Heard May 17th. Decided May 24th.

This cause having heretofore been dismissed as not brought in time [ante p. 268], a motion was now made to reinstate the same, on affidavits stating facts to excuse the delay.

G. Woodruff, for the motion:

The main question is, whether the statutory limitation of writ of error to two years from the judgment, or

Digitized by Google

other final determination of the case, begins to run pending the settlement of a bill of exceptions.

The affirmative of this question can not fail to strike harshly upon every ear at all sensitive to the discordant utterances of the law. It is a case so hard that it ought to find no countenance short of the imperial mandate of *stare decisis*. And that we say has not been proclaimed.

A statute limiting the period during which a writ of error may issue is not more imperative nor entitled to a stricter construction than a statute limiting the period during which an action may be commenced in a court of original jurisdiction. Nay, the accidents to which witnesses and documents are liable in the latter, constitute a distinction in favor of less strictness in regard to the former.

Now in regard to the general statutes of limitation, which are essentially in *pari materia*, it has been settled that if, at the time the right of action accrues, there is no person who can sue, and no one who can be sued, the limitation will not begin to run till there is such a person in esse: — 5 *B. & Ald.* 204; 15 *Conn.* 149; 1 *Johns. Cas.* 76. So when the right of action is suspended: — 12 *Wheat.* 129. And even when it is liable to be suspended: — 4 *Mass.* 16. *See particularly pages* 25, 26, 27, 28 *and* 29.

Though the particular statute in question here does not in terms provide that the period limited by it shall commence from the time the right to the writ accrues or it can be issued with effect, yet by all analogy of construction that condition is implied.

The impossibility of issuing the writ of error until the bill of exceptions was settled, without defeating the entire object and end of issuing it at all, is supposed to be sufficiently clear upon the authority of 2 *Tidd Pr.* 863 and the case of *Dillon v. Parker*, 1 *Bing.* 17.

E. C. Hinsdale, contra.

Digitized by Google

TELLER v. WILLIS.

CAMPBELL J.:

Plaintiff in error moves to reinstate this case, which was dismissed as brought into Court too late. The affidavits show that the bill of exceptions, which was signed under a mandamus from this Court, was delayed, in its final settlement, at the request of the counsel for defendant in error. There was no laches in plaintiff in error, or his counsel, up to the time of signing the bill of exceptions. The writ was issued and served within a year from that time, but more than two years after judgment.

We think there can be no doubt that the statute bar commences running from the rendition of judgment:— *Fleet v. Youngs*, 11 *Wend.* 522; *Lee v. Tillotson*, 4 *Hill*, 27; *Manhattan Co. v. Osgood*, 1 *Cow.* 65. The exceptions do not operate upon the judgment in any way, until steps are taken to remove the cause for review. And we do not well see how any saving clause can be introduced into the statute, which is not within the fair meaning of its language.

The question then arises, whether a party is bound to wait for the sealing of a bill of exceptions before he issues his writ of error. It is said by *Mr. Tidd* (2 *Tidd's Pr.* 863) that by bringing a writ of error before the bill is signed, it is waived. For this he cites *Dillon v. Parker*, 1 *Bing.* 17; *S. C.* 11 *Price*, 100. The report in Bingham sustains this view, but the report in Price is more full, and it there appears that while *Wood B.* took this view, *Parke and Burrough, JJ.* placed their decision upon a different ground. The case was an application to the Court of Exchequer Chamber to compel the defendant in error to settle a bill of exceptions, so that the Judge who tried the cause might seal it, and also for an order directing the transcript to be amended by annexing the bill of exceptions when it should be completed. The majority put their decision upon the ground

Digitized by Google

that the Court of King's Bench must be applied to, in order to obtain the settlement, after which it might be brought up *by an allegation of diminution*, thus distinctly intimating that when sealed and filed it might be brought up like any other omitted portion of the record. The same question came up in the Common Pleas, in *Willans v. Taylor*, 6 *Bing.* 512, where, after the case had been removed by writ of error, an order was obtained requiring the plaintiff below, who had retained the copy of exceptions served on him, to return it for settlement. The case of *Dillon v. Parker* was referred to, and the Court held that it decided nothing which would prevent a party from being entitled to have his exceptions settled; and plaintiff was compelled to obey the order, the Court refusing to discharge it. They said it would be for the court of error to determine whether it would be allowed to be taken up after settlement. It appears by the report of the same case in the Exchequer Chamber, *Taylor v. Willans*, 2 *B. & Ad.* 845, that an order was subsequently made in the court of error, allowing the bill of exceptions to be tacked to the record; and the decision of the appellate court is based wholly upon the questions raised on exception.

In Willans v. Taylor, the counsel for the plaintiff in error, in order to show that the Court in *Dillon v. Parker* could not have held a writ of error to be a waiver of exceptions, referred to the almost uniform practice that has always prevailed, of issuing writs of error before judgment is entered (and therefore before exceptions are ever in fact settled), in order to prevent execution. Mr. Tidd recognizes this as the usual practice: — 2 *Tidd's Pr.* 1141; *see also Arnold v. Sandford*, 14 *Johns.* 417; *Richardson v. Backus*, 1 *Johns.* 493.

It is a very common practice to allow parties in error to supply deficiencies in the record, and to apply to the Court below to have the record corrected. In the case of

Digitized by Google

the *Manhattan Bank v. Osgood*, 1 *Cow.* 65, the Court of Errors of New York gave leave to plaintiffs in error to withdraw their assignment of errors, and to apply to the Supreme Court to have the real date of giving judgment made to appear, and also to send up the bill of exceptions, when more than five years had elapsed since the date of which judgment was rendered, and that lapse was set up in bar of the writ. It is manifest that cases might easily arise, of which the one before us is an illustration, where the statutory bar might become complete before exceptions could be obtained from the Judge settling them. It would lead to singular results, were there any waiver of exceptions caused by suing out a writ before settlement. In Lord Hale's notes to Fitzherbert's *Natura Brevium*, vol. 1, p. 22, note *d.*, occurs this passage. "By good opinion, one of the justices may deliver the bill into Court without a *scire facias;* yet in that case (11 H. 4. 65,) a *scire facias* issued, and the justices came and acknowledged their seals; and it was held, that this acknowledgment of the justices might be made long time after the writ of error brought, and after the *scire facias* awarded, and that no new *facias* shall issue; for it is now become parcel of the record *ab initio*, as in the case of diminution alleged after a *scire facias*. The defendant shall not allege diminution in the bill of exceptions, but ought to have shown his case when the justices came to set their seals. See 1 *H.* 4, 92. See also 11 *H.* 4, 67 *and note;* 11 *H.* 4, 92, *per Gascoign and Huls.* it was held clearly, that the bill may be sealed after the record removed by writ of error."

Our statute also plainly contemplates that the proper steps may be had to compel the signing of a bill of exceptions by the Judge who tried the cause, without reference to the issuing of a writ of error:— *Comp. L.* § 4406. But we conceive the rule very clearly settled by the authorities referred to. The Supreme Court will

Digitized by Google

always give a plaintiff in error the benefit of his exceptions, unless by his fault or laches he has occasioned the delay himself, by extending the time for return, or for the assignment of errors, or by allowing a new assignment, as the case may require.

The question involved in this motion came up in *Brown v. Bissell*, 1 *Doug. Mich.* 273, where it was held by this Court, under our former statutes, that a bill of exceptions signed after error brought was at most merely irregular; and the English cases in 6 *Bingham, and* 2 *Barn. & Ad.* were cited as showing that such a bill was good. We have thought it our duty to examine into the matter somewhat at length, as the counsel for plaintiff in error has been misled by the doctrine laid down by Mr. Tidd, into a mistake which, as the facts appear to us, we regret exceedingly that we are not able to rectify. As the statutory bar is complete, we are compelled to decline to reinstate the case. The equities being very plainly with the plaintiff in error, we deny his motion without costs.

MARTIN CH. J. and CHRISTIANCY J. concurred.

MANNING J. was absent at the decision.

The People on the relation of the Attorney General v. The River Raisin & Lake Erie Railroad Company.

Pleadings on information for usurping corporate powers. — In an information in the nature of a *quo warranto*, it is not necessary to set forth the franchises and privileges alleged to be usurped, except in general terms. It is always the right of the government to call upon those who assume corporate powers, to show by what warrant they do so; and when the defendants set forth their claims by plea, the Attorney General may show by replication the special grounds he relies on.

Digitized by Google

THE PEOPLE v. RIVER RAISIN AND LAKE ERIE RAILROAD CO.

Corporation confined to the purposes for which it was created. — Where by its charter a corporation is confined to one kind of business, it can not lawfully engage in enterprises foreign to that business. A railroad company whose purposes are strictly confined to the completion and maintaining of a railroad, can not lawfully engage in banking.

Banking powers, what are. — The issue of paper designed to circulate, in the form and similitude of bank bills, is an act of banking.

Duplicity in pleading. — A replication which, to show that defendants usurp the franchise of banking, avers that certificates issued by them are in the similitude of bank bills, and also that they are issued with intent to be put in circulation as money, is open to objection for duplicity.

Immaterial issue. — Information, calling upon defendants to show by what right they assume to exercise banking powers. Plea, setting forth a charter of defendants as a railroad corporation, which gave them no authority to issue circulating notes; and stating the issue by defendants of certain certificates which, as described, might or might not be within the statute against unlawful banking, and then denying that defendants have exercised the franchises charged "except as aforesaid." Held, that as the plea neither confessed nor denied the exercise of banking powers, the issue tendered by it was immaterial.

Heard April 15th and 16th. Decided May 24th.

Information in the nature of a quo warranto. The case was brought to a hearing on demurrer to the replication, and the pleadings are sufficiently stated in the opinion.

Backus & Harbaugh and *T. Romeyn*, for defendants:

1. The plea is bad as being a departure in pleading. The information charges solely the usurpation by the defendants of the franchise of banking, and on that ground alone asks judgment against them. This charge is distinctly traversed and put in issue by the plea; all the other matters set forth in the plea are mere inducement, and immaterial to the issue made by the traverse *of banking, or no banking, charged in the information.* This issue by the replication is abandoned, and a new charge set up therein; *that of an admitted corporation violating a criminal law of the State by issuing bills in the similitude of bank bills.*

2. The replication sets up three distinct and independent facts: 1st. That the evidences of debt granted to J. Q. Adams, are in the similitude of bank bills; 2d. That

Digitized by Google

said J. Q. Adams was, at the time of granting said evidences of debt to him, president of said corporation, and said evidences of indebtedness were signed by him; and, 3d. That said evidences of debt were granted and issued to him with an intent that they should be put in circulation as money. Which of these three distinct propositions is issue to be taken upon? Which, if either, is material to the question of banking, or no banking? The replication is manifestly bad, not only as tendering an immaterial issue, but as double and uncertain.

3. The replication is bad in substance, even were the matters therein pleaded sufficient; for want of an averment of an intent, on the part of the defendants, that the evidences of debt should be put in circulation as money.

4. The only charge in the information, and traversed by the plea, is the usurpation of banking powers.

Banking powers have been defined to consist of issuing negotiable notes, discounting notes, and receiving deposits: *People v. Utica Insurance Co.* 15 *Johns.* 390; *People v. Manhattan Co.* 9 *Wend.* 383; 2 *Cow.* 710; *Bouv. L. Dic. tit.* "*Banks and Banking.*"

All this is fully met and denied by the plea, distinctly putting in issue the charge alleged in the information.

This plea is wholly unanswered by the replication, which charges (insufficiently either for an information or plea) a new and distinct offense, created by section 5, chapter 50 of the R. S. of 1846, as amended by the S. L. of 1853,—that of issuing evidences of debt in the form and having the appearance of bank bills. The law under which this charge is made is in these words: "No person, association, or body corporate, whether public or private, except such bodies corporate as are or shall be expressly authorized by law to do a regular banking business, and to issue bank bills, shall issue any bills, notes, due-bills, drafts or other evidences of debt, in the similitude of bank bills, or to be loaned, or put in circulation as money, etc." The

Digitized by Google

replication nowhere avers either that the defendants' corporation is not expressly authorized to do a regular banking business, and issue bank bills, or that the defendants issued the bills, or evidences of debt, to be loaned or put in circulation as money. Such a charge would be bad in an indictment or information, and is equally bad in a plea: — *Koster v. The People*, 8 *Mich.* 431.

In proceedings by information of *quo warranto*, facts necessary to be alleged to show a neglect of duty, must be set out with all the exactness of pleading required in an action for a penalty: — 23 *Wend.* 198; 23 *Wend.* 223.

Where an offense is created by statute, and there is an exception in the enacting clause, the indictment must negative the exception: — 11 *Shep.* 232.

Upon every principle, therefore, the replication is bad.

A. Williams, *Attorney General*, and *T. M. Cooley*, for the People.

1. The *plea* is bad. The denial that defendants have used the franchise of a banking corporation, is coupled with an admission that, so far as issuing these certificates of indebtedness is concerned, they have done so. Issuing bills to circulate as money is the exercise of banking powers: — 2 *Cow.* 710. But such powers never having been conferred, this corporation does not possess them: — 2 *Cow.* 709; 11 *Ohio*, 1; 11 *Ohio*, 96; 15 *Johns.* 358. For the restraining act then in force, see *Laws of* 1833, *p.* 530, copied from *N. Y. Laws*, 1804, *p.* 615. If the plea does not assert the right of banking, to the extent of issuing these bills, the facts it sets forth are immaterial.

2. There is enough on the face of the certificates to show that they were designed to circulate as money. They are in the *form* of bank bills, signed by a *cashier*, payable to the *bearer*: — 4 *Edw. Ch.* 138, 170; 9 *Paige*, 471; 4 *Barr*, 328.

3. The replication is not double. It presents the single

Digitized by Google

point that the notes are issued with intent to be put in circulation as money. All the facts recited bear directly upon that point. The *form* they bear is only important as characterizing the intent:—15 *Wend.* 357; 1 *Burr.* 317.

4. The intent of defendants is charged in the same manner in which the intent is always charged in criminal cases. See forms, 2 *Arch. Cr. Pr. by Wat.* 1, 5, 20, 25, 28, 33, 35, 180.

CAMPBELL J.:

The Attorney General filed an information, charging defendants with usurping the following liberties, privileges and franchises, viz: "That of becoming proprietors of a bank or fund, for the purpose of issuing notes, and transacting other business which incorporated banks may and do transact, by virtue of their respective acts of incorporation, and also that of actually issuing notes and carrying on banking operations, and other monied transactions, which are usually performed by incorporated banks, and which they alone have a right to do"; and inquiring by what warrant they claim to use those franchises, &c.

The plea sets up the charter, and avers that under it the corporation was authorized, among other things, to "grant such evidences of debt which might be incurred by said company, as may be by the by-laws thereof directed, to such an amount as should be deemed necessary for the transacting of the business of the same"—"Provided such by-laws should not be contrary to the constitution or laws of the United States, nor of the State of Michigan." The plea proceeds to set forth certain by-laws requiring the president to sign, and the treasurer, as cashier, to countersign, all evidences of debt; which, by the same by-laws, were required to be in the form of a promissory note, payable to bearer on demand, at the office of the company in the city of Monroe: That from time to time large liabilities were adjusted by such evidences

Digitized by Google

of debt, to the amount of $200,000: That one James Q. Adams became the owner of a large amount of these, and presented them for adjustment, and they were adjusted by issuing similar evidences for the principal and interest due him: And the plea then denies that the defendants have exercised any of the liberties, privileges or franchises, charged by the information, "*except as aforesaid*"; and this they claim a right to do.

To this plea the Attorney General replied, that the evidences of debt granted to Adams were granted and issued to him "in the form, and having the appearance, of bank bills, in sums of one dollar, two dollars, and three dollars, the same being printed from engraved plates of the size in which bank bills are commonly issued, and with vignettes and other devices thereon which are usually found upon bank bills;" that Adams was president, and signed the certificates of indebtedness as such, "and that the same were so granted and issued to him, with intent that they should be put in circulation as money;" &c.

To this the defendants demur; 1st, because they say the replication is a departure; the offense set up not being the same set forth in the information: 2nd, for duplicity, as charging, (1) that the evidences of debt were in the similitude of bank bills, and (2) that they were intended to circulate as money: 3rd, that it does not aver an intent in the defendants that they should be put in circulation as money; 4th, that it does not admit, deny or traverse the plea; 5th, that the plea traversed the information, and the replication does not join issue upon it.

It is very well settled that, in an information in the nature of a quo warranto, it is not necessary to set forth the franchises and privileges alleged to be usurped, except in general terms. It is always the right of the Government to call upon those who assume corporate powers, to require them to show by what warrant they do so; and when the defendants set forth their claims by plea, the

Digitized by Google

Attorney General may reply and show the special grounds he relies on:—2 *Kyd on Corp.* 399, 403, 440; *Ang. & A. on Corp.* §§ 734, 756, 759, 760; *People v. Bank of Niagara*, 6 *Cow.* 196; *People v. Bank of Hudson*, 6 *Cow.* 217. The information in the case before us is precisely like that in *People v. Bank of Niagara*, and *People v. Utica Insurance Co.* 15 *Johns.* 358. The first question, therefore, which arises, is whether the matters set forth in the replication depart from the information, or, in other words, whether issuing notes payable to bearer on demand, intended to circulate as money, is business appropriate to incorporated banks, and not within the grants of defendants' charter.

The charter of the defendants authorized them to "grant such evidences of debt which may be incurred by said company, as may be by the by-laws thereof directed, to such an amount as shall be deemed necessary for transacting the business of the same." *Sec.* 11, *p.* 362, *Laws of* 1836. Their right to purchase, hold, sell, lease, and convey estate, either real or personal, or mixed, is expressly limited to "so far as the same may be necessary for purposes hereinafter mentioned, and no further." *Sec.* 3, *p.* 359. Those purposes are strictly confined to the completion and maintaining of a railroad. Any banking business would be foreign to such a charter; and it is difficult to conceive how evidences of debt "necessary for transacting the business of the corporation" could be made to embrace paper issued for general circulation, and payable on demand. In the absence of restriction, it is very possible that a corporation may use the same incidental means, to accomplish a given purpose, that might be used by an individual; but where it is confined to one kind of business, it can not lawfully engage in enterprises foreign to that business.

By the general laws in force at the date of this charter, it was provided that no person unauthorized by

Digitized by Google

law, should "subscribe to, or become a member of any association, institution, or company, or proprietor of any bank or fund, *for the purpose of issuing notes*, receiving deposits, making discounts, or transacting *any other business which incorporated banks may* or do transact by virtue of their respective acts of incorporation": *Laws of* 1833, *p.* 530. It was held in *Bristol v. Barker*, 14 *Johns.* 204, by somewhat nice verbal criticism, that an individual without partners was not liable to the penalty of this act, for doing a general banking business, of issue, discount and deposite. But in the case of *The People v. The Utica Insurance Co.* 15 *Johns.* 358, it was held that whatever might be the case as to individuals, no corporation or association could exercise these powers, without direct authority. In the case of *The Utica Insurance Co. v. Scott*, 8 *Cow.* 709, a note discounted by that company was held valid because the charter gave them express power to *loan* their funds. But the general doctrine can not, we think, be questioned; nor can a grant of a single power usually exercised by banks imply the right to any further and different banking powers. *In re. Ohio Life Insurance & Trust Co.* 9 *Ohio*, 291; *Duncan & Maryland Savings Institution*, 10 *Gill & J.* 299.

We do not deem it necessary, for the purpose of testing the sufficiency of the pleadings in substance, to examine into our subsequent penal statutes, concerning unauthorized banking; as, if the issue of this paper constituted an act of banking, it was not within the charter powers of defendants. We think the issue of paper designed to circulate in the form and similitude of bank notes is an act of banking, and is unlawful for the defendants. But it is objected that the replication is double, because it avers that the paper issued by defendants was not only in the similitude of bank notes, but was also issued with the intent that it should be put in circulation as money. Either of these allegations would be suf

Digitized by Google

ficient, under section 5899 of the Compiled Laws, to render the paper illegal, and subject the defendants to a forfeiture of their charter. It was held in *People v. Bank of Hudson*, 6 *Cow.* 217, that a replication may state a cause of forfeiture in very general terms, provided that they create but a single material issue. In the present case the facts all relate to a single alleged putting forth of illegal paper. But the only safe test of duplicity is to see whether a single issue can be made to controvert the pleading, by denying any one material fact. If defendants were to deny the similitude to bank bills, the fact that the notes were intended to circulate as money would not be affected by the denial, and would form a complete cause of action. So if the intent were denied, there would be a good cause of action upon the similitude. No single rejoinder would dispose of the whole replication. We think the replication is open to the objection of duplicity. This renders it necessary for us to examine the plea.

When called upon to show by what warrant they assume to exercise any franchises, the defendants were bound either to deny the exercise of the franchises, or to show what franchises they possess of the kind set forth in the information, and their title to them. In this case the defendants set up all their claim under their charter. This is declared to be a public law, and being so we are bound to take judicial notice of it, and to disregard all allegations in conflict with it. We are bound therefore to take notice that the charter of the defendants gives them no authority to issue any paper within the restraining acts. They have set forth in their plea that they have issued certain paper which they describe. But that paper as described may or may not be within the restraining acts. They therefore neither confess nor deny the exercise of banking powers, and the issue tendered by the plea is immaterial. Had they denied their exercise, the Attor-

Digitized by Google

ney General might have replied by averring the issue of illegal paper in such forms as he deemed proper, filing as many replications as he saw fit to raise separate grounds of complaint. Had they admitted the exercise of banking powers and set up their charter as authorizing it, if it had been a private act, issue might have had to be joined upon it, but inasmuch as it is a public act, the plea would have been bad on demurrer. Having done neither, the plea is not issuable, and must be set aside.

An order must be entered setting aside the plea for insufficiency.

MARTIN CH. J. and CHRISTIANCY J. concurred.

MANNING J. was absent when the case was decided.

Frederick B. Leonard, President of the Bank of Lansingburg v. Charles W. Taylor and another.

Setting aside sale in chancery: laches. — A sale under a decree in chancery in a foreclosure case will not be set aside on the ground of surprise and inadequate consideration, after a long unexcused delay, which has continued until an execution has been issued for a deficiency, and a sale made, under which third persons have acquired vested interests, and complainant has made payments to redeem from former sales.

Petition to set aside sale: offer to increase bid. — Petition being filed to set aside a sale under a decree in chancery on the ground of inadequate consideration, and the complainant — who was the purchaser — not having sought to take advantage of petitioner's embarrassments, and not appearing to have been at any time unwilling to receive the amount due upon the decree and the amount paid to redeem from prior sales, and to transfer to petitioner all rights acquired by the purchase, it was held that, under these circumstances, at least, it was a fatal objection to the petition that it did not offer to pay anything to complainant, or to increase the bid, in case a re-sale was ordered.

Heard May 19th. Decided May 24th.

Appeal in chancery from Kent Circuit.

The defendant Taylor petitioned the Court below to set aside a sale which had been made under a decree in

Digitized by Google

chancery in a foreclosure case. The case was heard on the petition, and on affidavits and counter affidavits, the result of which is stated in the opinion. The Court below denied the prayer of the petition, and Taylor appealed.

J. W. Longyear, for appellant.

Ball & McKee, and *T. M. Cooley* for defendant.

CHRISTIANCY J.:

We think the Court below properly refused to vacate the mortgage sale under the decree.

Assuming that the petitioner has sufficiently shown that the lands were bid in by complainant much below their real cash value at the time, that petitioner was misled by the assurances of complainant's solicitor of his intention to bid them in for the full amount of the decree, that he was surprised by this, and neglected the efforts he would otherwise have made to raise the money or to procure bidders at the sale, — none of which facts can be said to be very clearly established — still there is no sufficient excuse shown for the long delay of the petitioner in making this application; especially as it clearly appears that during this delay, and as a consequence of it, the rights of other parties have intervened and become vested, which would be disturbed by granting the remedy now sought.

The sale was made November 15th, 1860. On the 8th day of June, 1861, the execution was issued for the balance due on the decree, and levied on the other real estate of the defendant (petitioner). This real estate had mostly if not all been already sold on executions in behalf of other creditors of the petitioner, but the time of redemption had not yet expired. Complainant, to make his own execution available, was under the necessity of paying, and did pay, considerable sums to acquire the rights of the prior purchasers. A part of this property

Digitized by Google

was again redeemed from complainant, or his right therein acquired by Boardman, another execution creditor of petitioner. The year allowed to the petitioner to redeem, as well as the additional three months allowed to execution creditors to acquire the rights of purchasers, under the execution, were allowed to expire, and deeds were executed by the sheriff upon such sales, before this application was made to set aside the original mortgage sale made under the decree.

The alleged assurances of complainant's solicitor — that complainant was expected soon to be at Grand Rapids, and that an arrangement could be made satisfactory to petitioner — if clearly established, would hardly be sufficient, under such circumstances, to excuse such delay. But even these assurances are denied by the solicitor, and there is no evidence but his and that of the petitioner on the subject.

Nor do we see anything in the propositions made by complainant, or which petitioner alleges complainant agreed to make and did not, which can excuse this long delay under such circumstances. The petitioner does not appear to have called upon complainant to make a proposition till near the end of June, 1862, more than a year after the levy of the execution.

We can discover nothing in the case going to show that complainant has, at any time, been unwilling to accept the amount due him on the decree, with the amount paid to acquire the right of other purchasers, nor that he has sought to take advantage of the embarrassment of the petitioner to make a speculation out of his property. And, under such circumstances at least, it is a fatal objection to the petition that it does not offer to pay the complainant any thing whatever, and does not contain an offer to bid any higher sum, if the sale should be set aside, than that bid by complainant on the mortgage sale.

Digitized by Google

LEONARD v. TAYLOR.

The order of the Court below refusing the prayer of the petition, is confirmed, with costs.

MARTIN CH. J. and CAMPBELL J. concurred.

MANNING J. was absent when the case was decided.

James W. Tillman v. The People.

Ways, classification of. — Ways must be either public or private: there is no intermediate species of way for any purpose of passage.

Ways: acceptance of dedication. — The adoption by the Governor and Judges of the plan of the city of Detroit, and the laying down of a street upon the plat made by them, did not, of itself, constitute it a street or highway: this was but a naked dedication, which could only become effectual when accepted by the proper authorities on behalf of the public. People v. Jones, 6 Mich. 176.

The acceptance should be manifested by some act of the public authorities, either formally confirming or accepting the dedication, and ordering the opening of the street, or by exercising authority over it in some of the ordinary ways of improvement or regulation.

Where an alley was laid down on the plan of Detroit adopted by the Governor and Judges in 1806, and there was no act on the part of the public authorities accepting it, but the owners of adjoining lots were allowed to keep a large portion of it closed, and to erect valuable improvements upon and over it, until 1863, it was held, that it was now too late for the city to acquire any public rights in the part thus allowed to be closed, by acceptance alone.

Ways: cul de sac. — Held further, that as that part of the alley not thus closed was but a cul de sac, furnishing means of access to the rear of the lots upon each side, it could only be considered as an easement appurtenant to those lots, and in no sense a highway. People v. Jackson, 7 Mich. 432.

The parties interested in the adjacent lots would have a right to close this cul de sac, or to regulate its use as to them should seem proper, so far, at least, as respects its use as a way for passage or travel.

And it makes no difference, in this respect, that buildings erected along it, but since removed, were for a time used as dwellings. Any right of way depending upon such use of the buildings would cease when the buildings were removed.

Dedication for other purposes than for ways: acceptance. — If the laying down of alleys, by the Governor and Judges, on the plan of Detroit, is to be treated as a dedication for any public purpose besides that of ways for passage or travel, an acceptance or adoption of that dedication was just as essential to give them a public character, for any other purpose, as to give them that character as ways.

Heard May 4th. Decided May 24th.

Digitized by Google

TILLMAN v. PEOPLE.

Error to the Recorder's Court of Detroit, where plaintiff in error was convicted on a prosecution for obstructing a public alley. The facts sufficiently appear by the opinion.

G. V. N. Lothrop, for plaintiff in error:

1. Is one of the interior openings in a city block, used only as a passage to the rear of lots, a highway, or only a private way or easement to the lots?

It must be one or the other: — *Ang. on Highways*, 1, 3; 6 *Pick.* 62.

If it was a highway, then, of course, an obstruction would be an offense under the general laws of the State, and not the subject of municipal legislation as punishment on matters embraced within the general statutes or common law.

But it is clearly only a private way: — *The People v. Jackson*, 7 *Mich.* 445; 3 *Hill*, 606; 4 *Cush.* 339; 16 *Barb.* 251; 5 *Seld.* 258; 23 *Barb.* 115.

2. If this was not a public highway, could the abutting owners, all concurring, extinguish the easement and close it?

It seems to me plain that they could: — 7 *Mich.* 451; 4 *Cush.* 339; 3 *Hill*, 606; 5 *Seld.* 258, 260; 37 *Penn.* 503; 5 *B & Ald.* 457.

Indeed, it seems doubtful whether the alley, *regarded as a separate easement*, does not at once become extinguished when *all of the property* over which it passes, and to which it was appurtenant, falls into the hands of one owner. For, generally, a man can not have an easement in his own estate. By merger the less interest is extinguished in the greater: — 5 *Met.* 450; *Wash. on Easements*, 517.

Any act done by the owner of an easement, with respect to the dominant estate, which is inconsistent with

Digitized by Google

the continuance of the easement, will operate as an extinguishment of it:—9 *Met.* 395; *Wash. on Easements*, 537, *and cases cited.*

And, *a fortiori*, when the titles of all the estates are united, any act of the owner, which shows that he intends that the easement shall no longer continue, must operate to destroy it.

C. I. Walker, for defendants in error.

CHRISTIANCY J.:

This was a prosecution against the plaintiff in error, by complaint in the Recorder's Court of the city of Detroit, for "obstructing and incumbering a public alley in said city, running westerly from the westerly line of Griswold street, between Jefferson Avenue and Woodbridge street, by erecting upon and in said alley, a small office or building, contrary to the ordinances of said city."

The ordinance claimed to have been violated provides that "No person shall obstruct or incumber any public wharf, street, alley or other public space, with any article or thing whatsoever." See *Revised Ordinances of* 1863, *Ch.* 29, § 5. This ordinance relates to no other alleys than such as are essentially of a public character, or which have, in some way, become established for the public use as public grounds; and which, therefore, the general public, or at least the people of the city, have a general interest in keeping, and a right to keep, unobstructed. The complaint must be understood (if it be sufficient for any purpose—a question we shall not discuss)—as intended to describe the alley in question as one of this public character. The power of the Common Council to prohibit by ordinance the obstruction of alleys of a private nature, made only by, or for the use of, the owners or occupants of particular lots, and depending only upon

Digitized by Google

the consent or agreement of individual property holders, is not claimed, and could not be supported; though, for purposes connected with public health the Common Council would doubtless possess certain powers over private alleys and other private property.

But neither the ordinance in question, nor the complaint in the case, would seem to have any reference to acts affecting the public health: both speak only of "obstructing and incumbering streets, alleys, &c." The object of this provision of the ordinance would seem to be mainly, if not entirely, so far as relates to alleys, to secure the use of them for purposes of passage and travel. And the language of the prohibition is appropriate to this end. The public character of the alley, so far as it depends upon its use, or the right of the public to use it, *in this manner*, can only be maintained on the ground that it is a public way or highway. Ways must be either public or private: there is no intermediate species of way for any purpose of passage.

Our first inquiry then, is, was this alley a public way or highway at the time of the obstruction or incumbrance complained of?

The alley was laid down upon the plan or plat of the city made by the Governor and Judges in 1806–7, and, as exhibited upon this plan (upon paper), it extended through the block from Griswold street to Shelby street: but no part of the alley was ever opened by any one, or for any purpose, further west than the east line of the Campau lot, 132 feet west from Griswold street; thence through to Shelby street it has always remained closed. Across the west part of this 132 feet of the alley (which was formerly open) a brick building was erected within about six feet of the ground, to connect two stores (next the Campau line) on opposite sides of the alley. This building seems to have been erected prior to the obstruction complained of, which is further towards

Digitized by Google

Griswold street. By the same plat of the Governor and Judges there was a spur or offshoot of this alley, extending southwardly from it between lots 48 and 50, to the rear of lot 49, where it stopped without connecting with any other passage. This spur, alley or cul de sac, was never opened, and is now covered by the block of brick buildings erected by Stephens & Field (the latter being the complainant in this prosecution). It does not appear from the evidence that the public or corporate authorities of the town or city of Detroit ever accepted or adopted this alley, or any part of it, or that they ever claimed or exercised any authority over it, by way of improvement, regulation or otherwise. And so far as it has, at any time, been kept open at all, it has been by the acts or sufferance of the owners of the adjacent lots.

We held in *People v. Jones*, 6 *Mich.* 176, that the adoption by the Governor and Judges of the plan of the city of Detroit, and the laying down of a street upon the plat made by them, did not, of itself, constitute it a street or highway; that the action of the Governor and Judges, acting on behalf of the United States as proprietors, was but a naked dedication of the land for a street, and that, as in the case of other land owners, it was essential, before such dedication could become effectual, that it should be accepted by the proper authorities on behalf of the public: that such acceptance should be manifested by some act of the public authorities either formally confirming or accepting the dedication, and ordering the opening of such street, or by exercising authority over it, in some of the ordinary ways of improvement or regulation. If this be necessary in case of a street laid down upon the plan, in order to constitute it a highway, it must be at least quite as essential in the case of an alley laid down upon the same plat.

But as the proper public authorities have never yet accepted, nor exercised any authority over any part of

Digitized by Google

this alley, as shown by the plan, and the owners of lots have been allowed to keep it closed west of Campau's east line, and valuable improvements have been erected upon or over that part of the remainder next east of this line, it would now be too late for the city to acquire any public rights in that part not now open by such acceptance alone. The alley must therefore be considered as permanently closed west of Campau's east line, and so far east thereof as improvements have been erected upon it. The remainder of the alley thence east to Griswold street is therefore but a cul de sac, furnishing a means of access to the rear of the lots upon each side, and can only be considered as an easement appurtenant to those lots, and in no sense a highway. This point was fully considered and decided in *People v. Jackson*, 7 *Mich.* 432; and we have seen no reason to change the views there expressed. And we think it clearly competent for all the parties interested in the adjacent lots to close the alley, or to regulate its use as to them shall seem proper; so far, at least, as respects its use as a way for passage or travel.

But it appeared that in 1832 there were several buildings on the south side of that part of the alley east of Campau's line, which were used as dwellings, and that this was used as a way to them; and on this ground it is claimed that this alley had become, thus far, a highway by user. If the owners of these lots chose to construct dwellings fronting on this alley, instead of the street, they had a right to do so; but they had an equal right to remove them; and this they seem to have done many years ago. It is quite evident, we think, that the use of the alley as a way to such buildings depended wholly upon the will of the lot owners; so far, at least, that when the buildings were removed, or ceased to be used as dwellings, any right of way depending upon such use of the buildings would also cease.

Digitized by Google

But it is claimed by the prosecution that there are other public purposes to be subserved by the alleys of the city besides that of passage or travel, and that, for such other public purposes, the public interest of the city requires that they should be kept open. This may be true in respect to such of the alleys as have been opened, accepted or adopted by the proper corporate authorities. But no question of this kind arises in the present case, and we give no opinion upon it. If the platting of these alleys by the Governor and Judges is to be treated as a dedication for any other public purpose besides that of ways for passage or travel, an acceptance or adoption of that dedication was just as essential to give them a public character, for any other purpose, as to give them that character as ways.

The charge of the Court below assumed that the mere platting of this alley by the Governor and Judges constituted it a public way; or, at least, public ground, which the Common Council had a right to control as such: that the lot owners had no right, therefore, by mutual consent, to close, obstruct or incumber it, or to regulate its use by agreement; and that such obstruction or incumbrance was an offense within the prohibition of the ordinance. The charge in these respects was, we think, clearly erroneous. So far as appears by the case as now presented, no public right has been injured by the obstruction complained of. The only injury shown to arise from the obstruction, if any, is but a private injury to one of the lot owners, for which he can only resort to his appropriate private action.

The judgment of the Recorder's Court must be reversed, with costs, and the conviction set aside.

MARTIN CH. J. and CAMPBELL J. concurred.

MANNING J. was absent.

Digitized by Google

Hiram Dodge v. William B. Stanton, Executor of, &c. of Nehemiah P. Stanton.

Transfer of notes as conditional payment: obligations of the holder. — Where one transfers notes to another, [for property purchased, on an agreement that if the notes "are not collected, the said [purchaser]] is to make up to the said [seller] the deficiency,"— the purchaser only receives the notes as conditional payment; and if they are not paid at maturity, he is under no obligation to bring suit upon them, but may immediately sue the purchaser for the amount. Per CHRISTIANCY J.

The effect of thus receiving notes as conditional payment is simply to postpone the payment of the demand on which they are received, until the securities fall due. Per CHRISTIANCY J.

Costs against estates of deceased persons. — Where an executor resisted a claim against the testator in the Circuit Court, and after decision by that Court allowing it, removed the case to the Supreme Court, and that Court was of he opinion that there was no reasonable ground for thus resisting the claim, costs of the Supreme Court were awarded to the claimant.

Heard May 13th. Decided May 24th.

Case made after judgment, from Jackson Circuit.

The case was brought into the Circuit Court by appeal from an order of the Probate Court disallowing a claim presented by the plaintiff against the estate of said Stanton for the amount of three promissory notes transferred by said Stanton to the claimant, and which the latter had failed to collect. To establish his case in the Circuit Court, the plaintiff offered in evidence a written agreement, signed by himself and said Stanton, dated October 16th, 1846, as follows:

"Whereas the party of the first part is now foreclosing a certain mortgage on the undivided half of certain village lots in Ford's addition, known as lots 5, 6, 7 and 8, in Block 28; and whereas the said party of the first part has made an agreement with the party of the second part for bidding off the same at the master's sale. Now therefore, this instrument witnesseth, that in consideration of the said party of the second part complies with his covenant hereinafter specified, the said party of the first part hereby agrees that, on the sale of said premises by said master

Digitized by Google

as aforesaid, the said party of the second part may bid the same off at six hundred dollars; and if the said party of the second part does bid the same off at that price, he is to allow the said party of the first part four hundred dollars for said bid, and not the full amount of six hundred dollars. If the said party of the second party sees fit to run the same up to a higher sum than six hundred dollars, then he is to add to the said amount of four hundred dollars his additional bid over six hundred, as aforesaid. If the said party of the second part does not bid over six hundred dollars, and he allows others to bid the same off, then this agreement is of no effect. In case the said party of the second part bids the same off as aforesaid, then he is to have said master's deed on said foreclosure, on paying the said party of the second part the sum of four hundred dollars as aforesaid, or more if the same is run up higher than six hundred dollars. The payments as follows: A certain bond and mortgage executed by Morgan Case, bearing date the eighteenth day of June, 1846, for the sum of two hundred and fifty-three dollars and thirty-four cents, with interest on the same to this date. Also, a certain bond and mortgage executed by Benjamin Whitney, bearing date the 17th day of July, 1846, for the sum of sixty dollars, with interest to this date. Also, three promissory notes executed by James A. Preston, dated September 11th, 1846, for the sum of twenty-five dollars each, with interest to this date. If the said party of the second part bids a higher sum than six hundred dollars, then he is to pay the same to the said party of the second part in one and two years. It is hereby agreed by said Stanton to bid the same off at the sum of six hundred dollars on said sale as aforesaid. If the foregoing securities are not collected, then the said party of the second part is to make up to the said Dodge the deficiency. The said party of the second part

Digitized by Google

is to have only the interest which the said Dodge secures by said foreclosure."

Plaintiff then proved that, on January 18th, 1853, he recovered judgment on said Preston notes before a justice of the peace, upon which execution was issued January 26th, 1853, and returned nulla bona.

James B. Wood being sworn for the plaintiff testified that, at the date of contract, Dodge and Stanton came to the office of witness, for the purpose of leaving with witness the notes and other papers set forth in the contract. The conditions upon which they were to be left were stated to witness. Witness suggested a written contract It was assented to. Witness drew it up, and it was signed by them and witnessed. This is the contract in question. Witness held the papers for both parties. In case Stanton did not bid off the property, witness was to return papers to Stanton. Witness attended at the master's sale. Stanton bid the property in for six hundred dollars, and received a master's deed for the premises. Witness proceeded to collect said claims as they became due, except the notes. Witness made inquiries of Quimby and other persons residing in the vicinity of Preston, and was informed by them that nothing could be collected of Preston on the notes. Witness so informed Stanton several times. Witness finally said to Stanton that he must pay the amount of the notes. Stanton then requested witness to sue the notes in witness's name, and procure a judgment on four notes. If collected, witness could pay proceeds of one of the notes to Stanton, after deducting expenses of collecting. If notes were not collected of Preston, he (Stanton) would pay them to Dodge. Witness proceeded as Stanton requested. A summons was issued and served. Preston, before return day, called at witness' offiee. He said the notes were given for a tax title, and it had proved worthless, and he would not pay them, and did not believe that we (Livermore & Wood)

Digitized by Google

were smart enough to collect them of him. Witness obtained a judgment, and an execution was issued and returned unsatisfied. Dodge and Stanton after that came to witness's office together. They came, they said, for the purpose of looking their matters over. Dodge requested Stanton to pay the amount of the three notes. Stanton said he thought he could collect the judgment of Preston, requested Dodge to let him try, before he (Stanton) paid the amount due to Dodge, and if he did not collect it, he would pay the amount to witness for Dodge. Witness thinks there was some time specified, but can not now state particularly. Dodge assented to the delay, as Stanton requested. Witness gave directions to the justice to allow Stanton to control judgment. Stanton never paid it, to witness's knowledge. The conversation between Dodge and Stanton, in witness's office, was some two or three years after the rendition of said judgment against Preston. One of the four notes upon which judgment was rendered belonged to Stanton.

The defendant then called Preston as a witness, who gave evidence tending to show that, during the years 1847-8-9 and-50, he had property subject to execution from which the amount of the judgment might have been collected.

On this evidence the Circuit Court gave judgment for the plaintiff for $145.28, and an appeal was taken on behalf of the estate.

Livermore & Wood for plaintiff:

The Preston notes were not received as absolute payment and satisfaction of the $400, but as conditional payment. To have them apply as absolute payment it must be made clearly and distinctly to appear that the parties so intended: it can not be implied. As conditional payment, they ceased to be payment on not being met at maturity. Dodge was under no obligation to take active

Digitized by Google

measures, by suit or otherwise, for the collection of the notes, and could therefore lose nothing by negligence if he had been guilty of any.

M. McGee for defendant:

The clause in the contract, that if the securities are not collected, Stanton is to make up to Dodge the deficiency, is a simple *guaranty of the collection* of demands which Dodge was to receive in payment.

But if the demands were received as *conditional* payment only, then Dodge, by accepting them, accepted also the duty of using due diligence in their collection; and he will be responsible for any loss resulting from his neglect. Preston's testimony clearly shows that, by diligence, the demand might have been collected. The negligence of Dodge had fully discharged Stanton before the conversation testified to by Wood; and he could not be again made liable for the demand against Preston without a promise in writing.

CHRISTIANCY J.:

The three promissory notes of Preston received by Dodge as part of the sum of four hundred dollars which Stanton was to pay for the mortgaged premises, were not received in absolute payment. The written agreement, in pursuance of which they were received, expressly provides that, "if the foregoing securities" [of which the notes were a part] "are not collected, then the said party of the second part" [said Stanton] "is to make up to the said Dodge the deficiency."

It is very clear, therefore, that the notes were received as conditional payment only, to apply in payment, if collected, or, in other words, if paid. This had the effect to extend the payment of so much of the four hundred dollars to be paid by Stanton till the notes respectively became due: but, if not paid at maturity, Dodge was

Digitized by Google

under no obligation to bring suit upon them, but might at once resort to Stanton for the amount of each note not paid when due. If Stanton wished to have suit brought upon the notes or either of them, he might at any time have paid to Dodge the amount of the note or notes dishonored, and obtained the same as his own, and then have taken his own course for their collection.

Stanton had not indorsed the notes, nor was there any indorser or guarantor to be held liable upon them. The only party liable upon the notes was the maker. His liability was fixed and unconditional; and Dodge had therefore no duties to perform by way of demand and notice to hold him to his liability. Had the notes been indorsed or guarantied (in such a manner as to require demand upon the maker and notice of non-payment), it would have become the duty of Dodge to take all the steps necessary to hold the indorser or guarantor liable; and if he had neglected this, he might have made the paper his own, and thereby released Stanton from his liability to pay the amount.

Such, we think, is the legal effect of the agreement upon which the notes were received by Dodge; and the subsequent acts of the parties after default in payment of the notes, show that it was thus understood by both. The notes, with another which had never been turned out to Dodge, were, at the instance of Stanton, put in suit, and a single judgment obtained upon all of them in the name of Wood. Stanton, after this, when called on for payment, said he thought he could collect the amount of Preston, and wished to be allowed to try before he should pay Dodge: and if he did not succeed, he would pay the amount: witness thinks there was some time fixed for this purpose, but can not state it. Dodge assented to the delay; and directions were given to the justice to allow Stanton to control the judgment.

We think that the Circuit Court came to the proper

Digitized by Google

conclusion upon the evidence, and the judgment must be affirmed. As the costs are in the discretion of the Court (*Comp. L.* § 2940), and as we can see no reasonable ground for resisting the claim by bringing the cause to this Court, plaintiff must recover his costs here.

CAMPBELL J.:

Whether Stanton's liability depended on non-payment or failure to collect the notes described in the case, it is established by the facts; and the judgment obtained on the notes remains unsatisfied after execution duly issued on it: — *Thomas v. Dodge*, 8 *Mich.* 51. I therefore concur in affirming the judgment.

MARTIN CH. J. also concurred in the result.

MANNING J. was absent when the case was decided.

John Palmer v. George M. Rich.

Drainage laws of 1857 *and* 1859: *void proceedings.*—Proceedings being taken under the act of 1857 "to provide for the draining of swamps, marshes and other low lands," (*Comp. L. p.* 444) as amended in 1859 (*Laws* 1859, *p.* 499), a venire was issued by the chairman of the drain commissioners without any application being made to the commissioners by resident freeholders. As the amendatory act plainly requires this, the proceedings were held void.

Drainage law of 1859: *saving clause.* — In the act of 1859 the saving of "any engagement, contract or undertaking heretofore entered into by the commissioners," does not keep alive any proceedings commenced under the old law, in any incipient stage, where no vested rights have accrued.

Drainage law of 1859: *deeds on sales for taxes.* — Where lands are sold for taxes which include taxes assessed under the drainage law of 1859, the deeds given by the Auditor General are prima facie evidence of regular proceedings in the assessment and subsequent steps to a sale.

Removing cloud upon title: injunction to stay tax sale. — Where an illegal tax is assessed upon lands, and by statute the deed given on a sale of the land therefor would be prima facie evidence of regular proceedings in the assessment and subsequent steps to a sale, such sale would operate to create a cloud upon complainant's title, notwithstanding the illegality must appear on the face of the proceedings: and the owner may therefore maintain a bill in equity to stay the tax sale.

Digitized by Google

PALMER v. RICH.

Jurisdiction in equity: averment as to amount in controversy. — Bill in equity to restrain a sale of lands for taxes. The bill avered the tax to be "about one hundred and fifty dollars." Held a sufficient averment that the tax was more than one hundred dollars.

Bill to restrain sale for taxes: parties. — To a bill filed against a county treasurer to restrain a sale for taxes assessed under the drainage law of 1859, and to annul the tax, the contractors for making the drains are not necessary parties.

But the Auditor General is a necessary party: as in all proceedings to collect the taxes after they are returned to his office, or to sell the lands to enforce them, the county treasurer is only the agent of the Auditor General, and does not act as a mere county officer.

Practice: leave to amend at the hearing. — An objection for the want of a necessary party in chancery was not made until the hearing. The bill made out a case on all other points, and the Court granted decree for complainant as prayed. On appeal, the Supreme Court, in reversing the decree for want of parties, granted leave to amend, and allowed an injunction which had been decreed to stand until the further order of the Court below, to which the case was remitted.

Heard April 22d. Decided May 10th.

Appeal in chancery from the Wayne Circuit. The facts are stated in the opinion.

E. C. Hinsdale, for complainant:

1. The tax was clearly levied without any authority on the part of the drain commissioners.

Under the act as amended, in order to give the drain commissioners jurisdiction to take any proceedings in reference to the construction of a drain, it was necessary that an application should be made to them in writing, by ten or more resident freeholders. *Laws of* 1859, *p.* 500. The bill shows that no such application was made to the commissioners.

The statute also contemplates the drainage of lands when the public health requires it, and taxation to meet the expense of such drainage.

The bill shows that in all the proceedings of the drain commissioners, nothing appears to show that in their judgment or in the judgment of a jury the public health was affected by the swamps to be drained.

The bill also shows that the ditch was not let upon

Digitized by Google

the day advertised, and that it was let without any public notice of the letting thereof.

For these and other reasons appearing on the face of the bill, we insist that the tax was levied without any authority, and that it is illegal and void.

2. The complainant's proper remedy is by injunction: — 3 *Ohio*, 86; 16 *Ohio*, 574; 38 *Penn.* 312; 10 *Wis.* 242; 24 *Mo.* 20; 3 *How.* 441; 9 *Wheat.* 738; 18 *Md.* 284.

This Court has virtually settled the question, that injunction is the proper remedy, by considering cases certainly not more within the province of a court of equity than this: — *Woodbridge v. The City of Detroit*, 8 *Mich.* 279; *The Sisters of Charity v. The City of Detroit*, 9 *Mich.* 94; *Jackson v. The City of Detroit*, 10 *Mich.* 248; *Lefevre v. The City of Detroit*, 2 *Mich.* 586; *Bagg v. The City of Detroit*, 5 *Mich.* 336.

3. This drainage tax stands upon the same basis as other taxes, and, if valid, becomes a lien at the same time, November 15th. Laws of 1858, p. 183, § 38.

Though invalid, it is still a cloud upon the title from that date, and if one sold with warranty, he would be bound to take care of the taxes as an incumbrance: — 6 *Ohio Cond.* 80; 1 *Beasley*, 227.

4. The second ground of demurrer, is, that the bill does not show that the amount of tax is sufficient to give jurisdiction.

This is not a ground of demurrer. In order to be demurrable for want of jurisdiction as to amount, it must affirmatively appear that the amount is too small: — *Gamber v. Holben*, 5 *Mich.* 335.

But as a matter of fact, the bill *does* show that the amount of the *tax* is over $150, and that the value of the *land* is $800.

5. The contractors are not necessary parties. They are at most but *consequentially* interested in the result, and are

Digitized by Google

clearly within the rule that such persons need not be parties: — *See Milf. Eq. Pl.* 171; *Story Eq. Pl.* § 140.

In general, those only are necessary parties against whom there can be a decree, yet there can be no decree against the contractors: — 1 *Dan. Ch. Pr.* 342; *Story Eq. Pl.* § 231.

Backus & Harbaugh, for defendant:

1. The proceedings set forth in the bill are sufficient to sustain the tax. They were sufficient under the law of 1857; and having originated under that law, they were saved by section 25 of the amendatory act of 1859, and no petition of freeholders for a venire was necessary.

2. But if the bill showed the proceedings to be manifestly defective, chancery would have no jurisdiction to interfere. The complainant does not make out a case falling under any acknowledged head of equitable jurisdiction. If the proceedings of the drain commissioners are illegal and void, as alleged in the bill, the illegality appears on the face of the proceedings, and they can not create a lien upon the premises, or a cloud upon the title: and the remedy of complainant is perfect at law when rights are sought to be enforced under the sale: — 9 *Paige*, 390; 26 *Wend.* 132; 9 *Paige*, 24; 14 *N. Y.* 534; 18 *N. Y.* 155; 15 *Barb.* 384; 4 *Barb.* 10; 25 *Conn.* 239; 5 *R. I.* 473; 6 *Gill*, 391; 2 *Cal.* 590; 20 *Penn.* 227; 24 *Mo.* 20.

It is submitted that the Auditor General has no power to give a deed on these sales. This power is omitted in the amendatory law of 1859, and in the absence of power by statute, none exists: — *Sibley v. Smith*, 2 *Mich.* 487.

3. The averment in the bill that the tax is "*about* one hundred and fifty dollars," does not sufficiently show jurisdiction. The averments of the bill, and especially those necessary to give jurisdiction, must be clear, certain and explicit: — *Mitf. Pl.* 45; 1 *Ves.* 56; 4 *Paige*, 365;

Digitized by Google

Welf. Eq. Pl. 10; *Story Eq. Pl.* §§ 26, 28, 240, 252, 256.

4. The contractors are necessary parties to the bill. They have a specific, direct interest in the tax.

5. The Auditor General is also a necessary party. The proceedings of sale are conducted by him, and the county treasurer is but his mere agent. So clear is this that if the county treasurer does not, on or before a given day, qualify by giving bonds to the approval of the Auditor General, the Auditor employs some other agent. *Comp. L. p.* 312, § 96.

CAMPBELL J.:

Complainant filed his bill to prevent the sale of certain lands in the township of Romulus, for a ditch assessment. The principal objections are that the *venire* was issued without proper authority; that it is defective in substance; that the verdict or finding of the jury is defective; and that the proceedings in letting the contracts are defective for want of legal notices.

The proceedings are alleged to have been had under the law of 1859. (*Laws* 1859, *p.* 499). That was the first law providing for a jury. The *venire* was issued by the chairman of the commissioners, February 25th, 1859. No application was made to the commissioners by resident freeholders, as provided by the act. The act of 1859 plainly requires this. The *venire* was issued under that law, and would not have been valid under the previous statutes. And the law of 1859, repealing several sections of the previous statute, saves only "any *engagement, contract or undertaking, heretofore entered into by the commissioners*": *p.* 504. The new statute does not contemplate any action commenced under the old law as subject to be kept alive in any incipient stage, where no vested rights have accrued. And it is impossible to regard any rights as having become fixed here, when the very purpose of

Digitized by Google

a jury is to determine the necessity of having any ditch at all. We can not assume that any steps have been, or could have been, lawfully taken in the present case, except under the statute of 1859. If, therefore, the allegations of the bill are to be taken as true—and upon demurrer they must be—the bill makes out a good ground of complaint.

It is suggested, however, that, if this tax is illegal, the illegality must appear upon its face, and therefore a sale under it would not operate to create a cloud upon complainant's title. It is certainly true that all steps in the assessment of a tax must appear of record. No part of the proceedings can rest in parol, and no presumptions can be raised of essential facts not appearing in writing. And if the tax deed is not *prima facie* evidence of regularity, then the objection may have considerable force. It is necessary, therefore, to examine into the state of the law on this subject.

The deeds made by the Auditor General, upon ordinary sales for taxes, are *prima facie* evidence of regular proceedings, in the assessment and subsequent steps to a sale. This tax or assessment, being exceptional and special, must be brought expressly under some similar provision, or the deed will not raise any such presumptions.

Under the Compiled Laws the sale for drainage assessments was kept entirely separate from all others. The land could not be bid in for the State.

The purchaser was obliged to pay all taxes for which the land had been bid in by the State, and was entitled to redeem from all other tax purchasers. *Comp. L.* § 1406.

By the law of 1859 these provisions were stricken out, and the section was made to read as follows:—"All lands upon which a tax shall be levied by virtue of this act, which may be returned to the office of the Auditor General delinquent for such tax, *shall be adver-*

Digitized by Google

tised and sold for such taxes, at the same time and in the same manner, and subject to like redemption, as lands delinquent for other taxes": *p.* 502. The provisions before referred to had made these tax sales exceptional in certain particulars, and the effect of striking them out, and adding the clause which was before omitted, "*subject to like redemption*," must be, we think, to do away with the former qualifications, which required the sale to be separate, and imposed conditions on the purchaser. The old law provided when and how a deed for drainage tax sales should be made. The new law makes no separate provision for a deed whatever. But if the sale is not separate, then, being had for all delinquent taxes, it must either entitle the purchaser to a deed which will embrace the drainage tax, or else it will require separate certificates and conveyances, although the sale was single. We can discover no meaning in the amendatory act, unless it is designed to put these taxes in the same condition with all others, requiring but a single sale for all, and making that sale subject to uniform conditions. And if this is its effect, there must be, we think, a similar uniformity in conveying, and the deed issued by the Auditor General, instead of being evidence of regularity in part, raises the presumption of regularity in favor of all the taxes for which the land was sold. Any other meaning must do violence to the sense of the statute. And while proceedings to divest private property can not be aided by unauthorized presumptions, we are bound to accept a fair and natural interpretation in preference to one that does violence to the language used. We think the deed for such taxes would be *prima facie* evidence of regularity, and that it would therefore create a cloud against which equity will grant relief.

It is objected, however, that the bill does not show a case within the jurisdiction, because the tax is not alleged to be above one hundred dollars. The bill alleges it to

Digitized by Google

be "about one hundred and fifty dollars." This is not a very accurate allegation, but it means more than one hundred dollars. Whether this is one of those cases in which the value of the property imperiled is the test of jurisdiction, it is not therefore important to inquire.

It is also objected that the contractors are not made parties, and that they are directly interested in the fund which is their only resort. The statute provides that no money shall be paid on any warrant drawn by the commissioners, out of any other fund than that derived from said taxes:—*Laws* 1859, *p.* 502. The former statute in addition to this prohibited the Auditor General from crediting or paying these taxes to the counties, until actually paid:—*Comp. Laws*, § 1405; while other delinquent taxes are credited when returned, and the Auditor is obliged to refund all delinquent town or county taxes received by him in excess of the state tax. *Comp. L.* § 856. It may be questioned whether, under the amended law of 1859, the county treasurer is not now entitled to retain in his hands the full amount of these assessments, as he is of all others, before he is called upon to pay over any moneys to the Auditor General. The statutes are not by any means as clear as might be desired on this point. But be this as it may, we think the contractors are not so interested as to make them necessary parties. The fund, as such, does not belong to them. Their warrants are payable out of it. But these warrants are negotiable, and receiveable on sales for those taxes:—*Comp. L.* § 1415. And until warrants are issued upon audited claims, the contractors have no rights in the fund. Their whole interest depends on the allowance of their claims by the commissioners:—*Comp. L.* § 1414. There are other accounts and expenses which are payable in the same way. The funds of the separate drains are not all kept separate, but several may go into one drainage fund; and it would be impracticable to attempt to trace

Digitized by Google

out the rights of warrant holders in the moneys raised from particular parcels of land. Each town collects the drain taxes assessed on lands within it. Warrants for making one drain may have been paid out of moneys assessed for another. Any attempt to trace out the rights of individual creditors of the fund would lead to endless confusion. The case is one where the public authorities adequately represent all parties, and we do not think it necessary to introduce others. Cases may possibly arise under some of our statutes, where private rights are so directly involved as to make their holders necessary parties to any litigation touching the fund. The interest here is too indirect to require it.

An additional ground of demurrer was taken *ore tenus*, that the Auditor General is a necessary party to a bill filed to cancel a tax.

This ground is well taken. The taxes remain in his office, and in all proceedings to collect them after they are returned there, or to sell the lands to enforce them, the county treasurer is the mere agent of the Auditor General, and does not act as a mere county officer. The bill prays, as it should, in such cases, not merely that the tortious act of an illegal sale may be restrained, but also that the tax may be annulled. This relief, if granted, operates directly upon the Auditor's books and entries, and imposes upon him certain duties concerning the taxes themselves, and the adjustment of accounts upon the basis of their rejection. The bill must be amended in this respect, although good on its face as to the merits. He should be allowed, therefore, to controvert the facts if he sees fit. Although admitted on demurrer, they may be put in issue by the defendants upon the introduction of proper parties. As this objection was not taken before the hearing, and as the bill makes out a case upon all other points, we shall, in reversing the decree below, grant leave to amend, and allow the injunction to stand until the further order of

Digitized by Google

the Court below, to which the case must be remitted for further proceedings. Defendant is entitled to costs of this Court. Costs below will abide the event of the suit.

MANNING AND CHRISTIANCY JJ. concurred.

MARTIN CH. J.: I concur that the Auditor General should be a party, if the bill can in any event be sustained.

Digitized by Google

Digitized by Google

JULY TERM, 1864, AT LANSING.

Henry W. Sage v. Edward C. Walker and others.

Renewal note when a payment. — A note which two parties had indorsed for a third being over due, the holder wrote the indorsers, requesting that a new note be sent in renewal. They sent one accordingly, made and indorsed by the same parties, payable at six months, and requested the return of the old note. No notice was taken of this request, nor were any steps taken to fix the liability of the indorsers on the new note; but after it fell due, suit was brought on the old note, and the new one was tendered to the parties on the trial, who refused to receive it. It was held, that the plaintiff, by retaining the new note, under the circumstances, had made it his own, and it operated as a payment of the old note.

Heard April 21st. Decided July 15th.

Error to Wayne Circuit.

June 1st, 1861, George B. Russell made a note for $548.42, payable on the first of September following, to the order of C. I. & E. C. Walker, at the Michigan Insurance Bank, Detroit, with eight per cent interest. This note was indorsed by the Walkers, to plaintiff, who resides in New York city. May 12, 1862, plaintiff, still holding the note, wrote to E. C. Walker a letter in regard to it, saying, among other things, "Add the interest, and give me a new note at 3, 4, 5 or 6 months." May 24, 1862, E. C. Walker replied to this letter, enclosing $100 in money, and a new note for $463.23, the balance, dated May 1, 1862, given by Russell and indorsed by the Walkers, payable six months after date at plaintiff's office in New York; and requesting the return of the old note. The old note was not returned by plaintiff, nor the receipt of

Digitized by Google

Walker's letter acknowledged; nor were the indorsers notified when the new note fell due and remained unpaid. November 12, 1862, plaintiff wrote the Walkers requesting payment of this second note, or a new note "to keep it alive."

The present suit was brought against the maker and indorsers, to recover the amount of the old note; the plaintiff retaining both that and the new note in his hands until the trial, when he tendered the latter to the defendants, who refused to receive it. Certain questions of evidence were raised on the trial, but they become unimportant in the view of the case taken by the Court. The Circuit Court charged the jury, that the reception of the new note by the plaintiff, enclosed in a letter from defendants, and asking for the return of the old note, made it the duty of the plaintiff, either to return the old note as asked, or to refuse to receive the new note; and that the keeping of the new note under the circumstances was an adoption of the contract as understood by defendants, and a discharge of their liability on the old note.

The jury returned a verdict for defendants.

D. C. Holbrook, for plaintiff, to the point that this charge was erroneous, cited, 2 *Pars. on Cont.* 196; *Jennison v. Parker*, 7 *Mich.* 355; *Hotchin v. Secor*, 8 *Mich.* 494; 2 *Cr. & Jerv.* 405; 5 *Beav.* 415; 6 *T. R.* 52; *Byles on Bills*, 304 *and note*, 307.

Walker & Kent, contra, cited, 30 *Miss.* 688; 40 *Me.* 457.

MARTIN CH. J.:

The charge of the Court was clearly correct, and settles the whole case, rendering a consideration of the questions of evidence unnecessary.

The effect of taking a second note upon the vitality of

Digitized by Google

the first is sometimes determinable by the law, and sometimes by the contract under which it was given and received. In the present case the correspondence of the parties, which went to make up the contract, shows that the second note was given and received in discharge of the first. Walker sent forward that note to be retained only upon condition of a surrender of the first. Sage was bound to return one or the other. By retaining both, he left it with the defendants to say that he had taken the new note upon the conditions Walker required, and the first note must be considered as surrendered up. This appears to have been Sage's view, when he had by carelessness omitted to have the second note presented and protested; for he asked for a third note in renewal of the second.

The judgment is affirmed, with costs.

The other Justices concurred.

Michigan Insurance Company v. Gideon O. Whittemore and others.

Appeal in chancery: reversal of decree for irregularity. — A decree in chancery will not be reversed for an error in no wise affecting injuriously the interests of the party appealing.*

Motion to set aside decree. — On a motion to set aside a decree for irregularity the affidavits should show that the party is injured by the irregularity.

Foreclosure: when reference unnecessary as to defendants defaulted. — Where, in a foreclosure case, the bill is taken as confessed by a part of the defendants, the evidence taken on the issue as to the others is evidence as to those who are defaulted; and a reference to take separate proofs as to them, covering the same ground, is unnecessary.

* See *Kellogg v. Putnam*, 11 *Mich.* 344; *Martin v. McReynolds*, 6 *Mich.* 70; *Warner v. Whittaker*, 6 *Mich.* 133; *Griggs v. Detroit & Milwaukee Railway Co.* 10 *Mich.* 167.

Digitized by Google

MICHIGAN INSURANCE COMPANY v. WHITTEMORE.

Notice in chancery, when not necessary. — Where such a reference was had without necessity, it was held that notice of the reference to the defendants who had appeared was not requisite. Kellogg v. Putnam, 11 Mich. 344.

Heard July 6th. Decided July 15th.

Appeal in chancery from Wayne Circuit.

The bill was filed to foreclose a mortgage given by Gideon O. Whittemore to complainants. Charles H. Whittemore was made a defendant, among others, as subsequent purchaser. The bill was taken as confessed by all the defendants except said Charles H. Whittemore, who answered, contesting the validity of the mortgage, and the case as to him was heard on pleadings and proofs. In addition to the amount of the mortgage, complainants claimed to recover certain moneys paid for insurance on the mortgaged property, and proof was taken to show the amount. April 27, 1863, the Circuit Judge, in the absence of defendant's counsel, announced his decision in the case in favor of complainants, and complainants' solicitor thereupon entered a common order, reciting the pro confesso as to all the defendants except Charles H. Whittemore, and referring the cause to a circuit court commissioner to compute the amount due. The reference was had the same day; the commissioner took proofs of the insurance moneys paid, and included the same as a part of the sum due. On April 29th, 1863, his report was filed and confirmed, and decree entered. No notice of this order of reference and the proceedings under the same, or of the report and its confirmation, or of the decree, was given to the solicitor for defendant Charles H. Whittemore; and on filing affidavit of that fact, and that said solicitor had no knowledge of these proceedings until June 11th following, a motion was made to set aside the decree for irregularity. The Circuit Court denied the motion, and defendant Charles H. Whittemore appealed.

Digitized by Google

MICHIGAN INSURANCE COMPANY v. WHITTEMORE.

C. I. Walker, *A. B. Maynard* and *M. L. Drake*, for appellant:

Under the statute — *Comp. L.* § 3500 — and rule 79, defendant was entitled to notice of the order of reference, the hearing before the commissioner, the filing of the report, and of the final decree. This is matter of strict right, and even if it was apparent that it could not, by any possibility, be injurious to us, we should still be entitled to have the decree set aside, and the case opened: *Jenny v. O'Flynn*, 5 *Mich.* 215; *Martin v. McReynolds*, 6 *Mich.* 75; *Kellogg v. Putnam*, 11 *Mich.* 344.

The reference was for something more than mere computation. Proof of the amount of insurance was taken, which defendant had a right to controvert. He was also entitled to rely upon the established usage of the court — that no *final* decree would be rendered until after a reference to the commissioner for a computation of the amount due, and notice thereof to himself; and he was not bound to anticipate or look for such decree until this had been done. Relying on such practice, he was in this case deprived of all right of appeal from the original decree.

S. D. Miller, and *G. V. N. Lothrop*, for complainant:

The reference was unnecessary: — 2 *Scam.* 545; 9 *Port.* 75; 11 *Mich.* 344. And want of notice of it could constitute no ground of complaint on the part of C. H. Whittemore. But the statute in regard to notice is not to be construed literally. Its purpose is, simply, to prevent undue advantage by *ex parte* proceedings.

But whether the Court below erred or not, the question presented involved simply the discretionary power of the Court, and will not be re-examined here: — 14 *How.* 1; 2 *How.* 240; 16 *Wend.* 369; 18 *Wend.* 350.

Digitized by Google

MANNING J.:

No reference was necessary in the case. The Court might have computed the amount due and rendered a final decree without it. The bill had been taken as confessed against three of defendants, and on the hearing against the other defendant all of the facts necessary to a final decree were before the Court, in the pleadings and proofs. The order of reference appears to have been entered under a supposition that it was necessary to render the proceedings regular against the parties who had not appeared. It is a common order, and recites that the bill of complaint had been taken as confessed against three of defendants, naming them, and orders a reference to a circuit court commissioner to compute the amount due on the bond and mortgage. Evidence was taken by the commissioner of the amount paid for insurance. But this was unnecessary, as there was proof of the same fact before the Court on the hearing. The evidence taken in the cause before the hearing was evidence against all of the defendants — against those who had not appeared as well as against the defendant who had. If we are correct in these views, then the reference was not one requiring notice to the opposite party, and there was no irregularity in the complainants' proceedings. See *Kellogg v. Putnam*, 11 *Mich.* 344.

Admitting irregularity, it is not stated in the affidavits, on which the motion to set aside the decree was made, that defendant has been injured thereby; and we have held that we would not reverse an order or decree for a mere irregularity in no wise affecting injuriously the interest of the party.

The order appealed from is affirmed, with costs.

MARTIN CH. J. and CHRISTIANCY J. concurred.

CAMPBELL J. did not sit in this case.

Digitized by Google

J. Mortimer Smith v. Sidney Lawrence.

Evidence of title to land. — A deed of lands is no evidence of title in the grantor, where he is not otherwise connected with the title, or shown to have ever had possession.

Evidence: plat book. — A book of township plats, found in the office of the register of deeds, is not admissible in evidence, where there is no law requiring it to be kept, or declaring it to be evidence.

Heard July 6th. Decided July 15th.

Error to Ottawa Circuit.

The action was upon a promissory note given for standing timber bought by defendant of plaintiff. In defense it was claimed that plaintiff was not the owner of the land on which the timber stood; and to establish this, defendant offered in evidence a deed from Morris Ketcham to Horatio J. Lawrence, of the same lands. This was objected to by the plaintiff, but the Circuit Judge overruled the objection, upon the ground, that, at that stage of the trial and evidence, the Court would not direct the order of the evidence introduced by the defendant; and the deed might be a link in a chain of evidence to be introduced by defendant, controverting the plaintiff's right to the land, or title to convey the timber thereon; and, further, that, standing alone, it might tend to prove to the jury such a cloud upon the plaintiff's title as to call upon him to remove the same by rebutting testimony; that it was not for the Court to decide upon the weight of such evidence in either case.

The defendant then called the register of deeds, who produced a book of plats, purporting to be plats of the various townships of Ottawa county originally, upon which the subdivisions of sections and parts of sections are marked, and the name of the purchaser of each description is written thereon; and said witness testified that he found said book of plats in the office of the register of deeds

Digitized by Google

of said county, when he came into said office, and that the name of Morris Ketchum was written upon the descriptions of land contained in the deed, as the original purchaser of said descriptions. To the receiving and reading of said plat book the counsel for the plaintiff objected, for the reason that it was incompetent and did not tend to prove that said Morris Ketchum had any right or title to said land. But the Circuit Judge overruled said objection, and allowed said evidence to go to the jury, remarking, that it was their province to determine whether it should have any weight with them; it might tend, with other evidence, to shift the burden of proof to the plaintiff, to show an affirmative title by rebutting evidence.

The defendant then called one Fletcher, who testified, that in the year 1861 he saw Horatio J. Lawrence while here in Ottawa county, and said Lawrence requested witness to see if any person was cutting timber on the lands described in the deed, and, if so, to forbid them in his name, as his agent; and he also authorized witness to employ counsel, if necessary, and bring suits against persons cutting on said lands; and that he, witness, went to the defendant in this suit, and forbade him, in the name of said Horatio J. Lawrence, to cut any more timber upon said lands, and told him that if he did cut any more on it he should prosecute him in trespass for the same.

The Circuit Judge charged the jury, that "the evidence must be such as to raise a fair presumption against the validity of plaintiff's title, before the plaintiff can be compelled to show his title by rebutting proof. In order to raise such presumption, it is not absolutely necessary to give in evidence a connected chain of title from the Government to a third party, or, in this instance, to H. J. Lawrence, down to the date of the sale, but the evidence must be such as to raise such presumption fairly in the minds of all the jurors before they can require the plaintiff to rebut

Digitized by Google

the same. The deed, the record of which has been read to the Court and jury, may be the subject of deliberation by the jury; whether it shall have any weight as evidence, is for them to determine. The Court, in the same connection, has admitted in evidence, and now permits the jury to use the book of plats of original entries in the several townships of this county, and containing, amongst other names of original purchasers, that of Morris Ketchum upon each of the legal subdivisions of land described in said deed to H. J. Lawrence, and said bill of sale by plaintiff. It may tend to prove or disprove the presumption we are now considering. The jury are at liberty to use it for what they shall find it intrinsically worth."

The jury returned a verdict for the defendant.

C. I. Walker, for plaintiff in error.

M. B. Hopkins and *T. M. Cooley*, for defendant in error.

CAMPBELL J.:

Plaintiff sued defendant upon a note, the consideration for which arose out of a sale of standing timber. Defendant endeavored to show that the consideration had failed because plaintiff had no title to the land upon which it grew. He introduced for this purpose a deed from Morris Ketchum to one Horatio J. Lawrence, but there was no other evidence of title in either of them, except a volume found in the county register's office purporting to contain township plats, with names written upon the various government subdivisions. The name of Ketchum was upon the plat on the tract in question. The Court allowed this to go to the jury, and allowed them to infer title in Ketcham from it. This was erroneous. There is no law requiring such a book in the county registry, or declaring it to be evidence. Title can only be deduced from the United States by the methods pointed out by act of Con-

Digitized by Google

gress; and in the absence of evidence of a regular documentary title, there should have been introduced at least presumptive evidence, by showing some possession, or other fact such as is allowed by the common law to make out a prima facie case of ownership. The giving of a deed is no evidence of title in the grantor.

The judgment below must be reversed, with costs, and a new trial granted.

The other Justices concurred.

The People, on the relation of George H. and Caroline French v. The Township Board of Springwells.

Laying out highway: whole road applied for, or none of it, should be laid out. — Where application is made to the highway commissioners to lay out a highway, under the statute of 1861, the commissioners must lay out the whole road applied for, or no part of it.

Laying out highway: who may complain of erroneous action. — Where a road is regularly applied for, and the commissioners decide to lay out a part of it only, any person through whose lands the road runs as laid, is entitled to take proceedings to test the validity of their action.

Costs against body acting judicially. — Application in due form having been made to highway commissioners for laying out a road, and they having made an order laying out a part of it only, and the township board on appeal having confirmed their action, the Supreme Court, on quashing these orders on certiorari, refused to award costs, as the township board was acting judicially on an application giving the commissioners jurisdiction.

Heard May 12th. Decided July 15th.

Certiorari to the township board of Springwells.

Certain freeholders of Springwells made an application in due form of law for the laying out of a highway in said township, extending from a certain point north of the Detroit & Toledo Railroad southerly across said road and Fort street to the River Rouge. The commissioners of highways, after due notice, met to consider the application,

Digitized by Google

and decided that the road as applied for was only necessary as far as Fort street; and ordered it laid out and established to that street and no further. The relators, who were owners of a lot north of Fort street which would be crossed by the contemplated road, appealed from this order to the township board, by whom the action of the commissioners was confirmed. The relators then sued out a certiorari to remove the proceedings to this Court.

H. M. Cheever and *L. Bishop*, for plaintiffs in error, to show that the order of the commissioners laying out a part only of the road petitioned for was void, cited, 2 *Green*, 385; 1 *Zab.* 86; 4 *Zab.* 736; 1 *South.* 31; 3 *Dutch.* 423; 18 *Vt.* 493; 5 *R. I.* 325; 8 *Pick.* 347; 41 *N. H.* 228; 42 *N. H.* 348; 12 *Cush.* 351; 30 *Me.* 302; 3 *Green*, 91; 13 *Shep.* 406; 23 *Me.* 9; 37 *Me.* 558; 9 *Fost.* 88; 11 *Ired.* 9.

E. Y. Swift and *G. S. Swift*, contra, objected that the relators were not so interested as to be entitled to raise the question; as the road, whether laid as applied for, or only to Fort street, would still cross their land. To the main point they cited, 13 *Pick.* 195; 19 *Me.* 338; 17 *Pick.* 154; 7 *Gray*, 57; 10 *Pick.* 270; 31 *Me.* 444; 22 *Conn.* 226; 24 *Conn.* 199.

MANNING J.:

The complaint against the action of the highway commissioners is, that they laid out a part only of the highway asked for. They should have laid out the whole of the road asked for or no part of it. We think the statute is clear on this point. It provides that, when any seven or more freeholders of a township shall wish to have a highway in any township, not included within the corporate limits of a city or village, laid out, altered or discontinued, they may, by writing under their hands, make application to the commissioners of highways of the township for that

Digitized by Google

purpose, who shall proceed to lay out, alter or discontinue *such highway*, &c. *Laws* 1861, *p.* 256, § 1. They are to view the premises described in said application, and ascertain and determine the necessity of laying out, altering or discontinuing *such highway*. *Ibid.* § 3. Not such highway — the one described in the application — or any part thereof; or such highway as the commissioners may deem expedient, unless it be the one asked for in the application. It does not follow that the freeholders would have united in an application for the part laid out because they had asked for that and something more. However that may be, the commissioners had no application before them to do what they did.

The road laid out crosses the relators' land, and if they are not interested in what the commissioners did, it would be hard to say who are.

The commissioners erred in laying out a part only of the road applied for, and the township board erred in affirming their action. The proceedings of both are quashed, but without costs, as the board acted judicially on an application giving jurisdiction to the commissioners.

MARTIN CH. J. and CAMPBELL J. concurred.

CHRISTIANCY J. did not sit in this case.

Samuel Farwell and others v. Charles H. Dewey and another.

Action on assigned contract: not necessary to prove assignment. — Where suit is brought on a contract in the name of the promisee *for the use and benefit of* another person named, the promisee is the legal plaintiff, and it is not necessary to show on the trial that the contract has been assigned to the person for whose use the suit is brought.

Digitized by Google

FARWELL v. DEWEY.

Statute of frauds: promise to answer for debt of another. — Contractors for the construction of a railroad gave their workmen certificates of the amount due them, which were presented to and accepted by the railroad company. Upon these certificates the plaintiffs furnished goods, which they charged to the contractors. In a suit brought against the contractors to recover the price, it was made [a question before the jury whether the goods were furnished on the credit of the contractors, or of third persons who, according to some of the evidence, were to make advances. The Judge charged the jury that if the goods were furnished under an arrangement with the contractors, or if they subsequently [assented to the goods being charged to them — in either case they would be liable. Whether the latter branch of this charge was correct, *quere;* the Court being equally divided on the question.

Heard October 17th, 1863. *Decided July 15th.*

Error to Genesee Circuit.

Charles E. Dewey and Alvin Crossman, suing for the use and benefit of Terbell, Jennings and Millspaugh, brought suit against the plaintiffs in error in assumpsit. On the trial before a jury it appeared that, in 1859, said Dewey and Crossman were merchants at; Flint that the defendants were at that time a firm under the name of Paul, Farwell & Co., and were engaged in constructing the Flint & Pere Marquette Railway Company's road, between East Saginaw and Flint, and that in the summer and fall of the year 1859, the defendants had several gangs of men at work, clearing and grading for their road, on the thirteen miles thereof next to the city of Flint, some of whom worked by the job, and some by the day. It appeared that goods to the amount of $1743. 70 were delivered at sundry times in the fall of 1859, from September 2d to December, to the men so in the employ of the defendants. Of this amount, $235.49 were furnished and at first charged to one Hughes, a sub-contractor under defendants; but afterwards charged over to defendants, $48.04 were delivered on the written order of Paul, Farwell & Co.; $27, on the written order of one of the members of said firm, and $1140.69 on orders, written or oral, by the foremen of the several gangs of men in defendants' employ, or by a sub-contractor. On the 21st of November, 1859, the defendants gave to sundry men certificates in the following form:

Digitized by Google

"Flint & Pere Marquette Railway Co. — There is due Michael Ryan forty-six and 77-100th dollars, for labor performed on the first thirteen miles of your road, next to Flint.

Paul, Farwell & Co.

Nov. 21st, 1859."

And these certificates (which were alike except as to name and amount,) were presented at the office of the said railway company, and were accepted by the company in writing (George M. Dewey then being the president, and E. H. Hazelton the treasurer of said railway company, and said Crossman one of the directors and a stockholder.) After the giving of such certificates and their acceptance as above, they were presented by the holders at the store of Dewey & Crossman, and goods delivered thereon to sundry men, and in sundry items, at different times, to the amount of $292.48, which amounts were severally indorsed on said accepted certificates by Dewey & Crossman, as payment to the extent of the goods so delivered, and all the goods so paid on such certificates were charged in the account by said Dewey & Crossman against the defendants, and made up a part of the amount of $1743.70, above spoken of.

There was no evidence in the cause of any transfer of the claim of said Dewey & Crossman to said Terbell, Jennings and Millspaugh, nor that said three last named parties had any interest in the suit, nor in the said cause of action.

Evidence was given on the part of the defendants to show that the goods so furnished were advancements to them by Dewey & Hazelton, under an arrangement with them to that effect; and that statements of account furnished to them from time to time by the plaintiffs, were so furnished in order that they might credit the same to said Dewey & Hazelton, which was done accordingly.

And thereupon the counsel for defendant requested the

Digitized by Google

Court to charge the jury, that Terbell, Jennings and Millspaugh are in this case the real plaintiffs in interest, and Dewey and Crossman are only nominal plaintiffs, and that without proof of a legal transfer of the cause of action to the real plaintiffs in interest, from Dewey & Crossman, the plaintiffs are not entitled to recover. This request the Court refused.

The counsel for the defendants further requested the Court to charge the jury, that the trading done on the certificates of Paul, Farwell & Co., addressed to and accepted by the Flint & Pere Marquette Railway Company, can not be charged to defendants, without proof of a request by defendants that Dewey & Crossman should pay these certificates, or a part of them; and without such proofs the plaintiffs can not recover for those items; which charge the Court refused to give; but on this point the Court charged the jury, that the plaintiffs could not recover unless the jury should find that the trading done on the certificates came within the original arrangement between the parties, or unless the defendants subsequently assented to the goods being charged to them; and in case the charging to defendants was within the original arrangement, or was subsequently assented to by them, that would make defendants liable.

The counsel for the defendants also requested the Court to charge the jury, that the amount of the account charged against Hughes, and afterwards transferred to the account of the defendants, is not a legal charge against the defendants, without proof of a promise in writing by defendants to pay the same. But the Court refused so to charge, but did charge that unless the jury find that the goods were delivered according to arrangement, or subsequently assented to by defendants, the defendants would not be bound by such transfer of accounts; but if there was such an arrangement on which

Digitized by Google

the goods were delivered, and such subsequent assent, then defendants were liable.

The counsel for defendants further requested the Court to charge the jury, that if the jury shall find from the testimony that the arrangement with plaintiffs, proposed or assented to by defendants, and pursuant to which the goods in question were paid out by plaintiffs, was understood by defendants, when made and while being carried out, to be an arrangement by which these goods were to be so supplied as payment in lieu of money for which Dewey & Hazelton had become responsible, and the minds of the parties did not meet and concur on any other arrangement, then defendants are not liable in this action, though plaintiffs may have understood the arrangement differently. But the Court refused so to charge, and charged the jury that defendants are not liable, although the plaintiffs may have supposed them to be, if the jury find that there was no express or implied agreement that they should become so, for the reason that the goods were not delivered to them.

The jury returned a verdict for the plaintiffs for the amount claimed by them.

J. G. Sutherland and *W. L. Webber*, for plaintiffs in error.

W. Newton and *G. V. N. Lothrop*, for defendants in error.

MARTIN CH. J.:

As the action purports to have been brought by Dewey & Crossman for the use of Terbell and others, the plaintiffs in error insist that proof should have been made of the assignment before judgment could be rendered against them; as they claim that the assignees are the real plaintiffs. And they assign error on the refusal of the Court below to instruct the jury in accordance with this view.

Digitized by Google

This refusal of the Court was clearly correct. The declaration contains no allegation of an assignment by Dewey & Crossman to any one; nor is such an allegation usual in these cases. The words "*for the use of*" *Terbell*, &c., were designed to show that Terbell &c., had a right to receive the moneys when collected. It is commonly a matter of no interest to defendants to whom the money belongs. See 1 *Ohio*, 242. Where the interests of the defendant may be affected by the ownership — as, for example, where he claims payments or a set off — proof of the transfer of the cause of action may become necessary, as the validity of the defense may depend upon the time when it was made, and when the knowledge of it came to the defendant. It is the nature of the defense which makes proof of the assignment necessary; and then it is necessary not for the benefit of defendant, but that the rights of the assignee may be protected by the Court.

Nor do I discover any error in the refusal of the Court to charge as requested by the defendants respecting the trading done on their certificates; or in the charge as given. As this is the only question upon which a difference of opinion exists in the Court, it may be well to look into the bill of exceptions to ascertain how the question arose. It will be seen that the request is confined to a particular subject, viz: the payment upon the certificates accepted by the Flint & Pere Marquette Railway Company. It is not a general request, covering the whole case; and the Court must be presumed to have confined his attention to the subject matter of the request, instead of extending it further. It is our duty to examine the errors assigned *as* assigned; and to go no further. Where a charge of the Court has been given upon a special request, we can not apply it to a part of the case not embraced, and to which the attention of the Court was not called. To do so would be unjust to the Judge

Digitized by Google

who tried the cause, and to the parties, who only expect to meet and try questions distinctly raised.

The facts shown by the bill — and they are not disputed — are these:

November 21, 1859, the defendants gave to sundry men certificates in the following form:

"Flint & Pere Marquette Railway Co. — There is due to Michael Ryan forty-six and 77-100 dollars, for labor performed on the first thirteen miles of your road, next to Flint.

Paul, Farwell & Co.

Nov. 21st, 1859. $46.77."

These certificates, which were alike except as to date and amount, were presented at the office of the railway company, and were accepted by the company in writing, after which they were presented by the holders at the store of Dewey & Crossman, and goods delivered thereon at different times to the amount of $292.48, the purchases being indorsed by Dewey & Crossman on the certificates, as payment to the extent of the goods so delivered; and all the goods so paid on the certificates were charged by Dewey & Crossman in account against the defendants, and made up a part of the amount of $1743.70.

The request of the defendants was, that the Court should charge the jury that the trading done on the certificates of the defendants, addressed to and accepted by the Flint & Pere Marquette Railway Co., could not be charged to defendants without proof of a request by defendants that plaintiff should pay those certificates, or a part of them; and without such proof the plaintiffs can not recover for those items. This the Court very properly refused; but did instruct the jury — and correctly — that they must find that the trading came within the original arrangement of the parties before they could find a verdict for the plaintiffs upon this item: and he further charged, "or unless the defendants subsequently assen-

Digitized by Google

ted to the goods being charged to them; *and in case the charging to the defendants was within the original arrangement, or was subsequently assented to by them, that would make defendants liable.*"

It is contended that this latter portion of the charge is erroneous, as it instructed the jury that, by subsequent parol assent, the defendants might be made liable for the debt of another without a promise in writing. I do not view the charge, nor its effect, in this light. The transaction was simply this: The goods had been charged to the defendants. They could either recognise the account or repudiate it at their option: if the first, the question of their liability would be settled; if the latter, it would be left to be judicially determined. But so long as the charge stood upon the plaintiffs' books against them, the defendants had a perfect right to admit or assent to it. As the case would stand, no one else would be the debtor. This was clearly the idea of the Circuit Judge in the charge, as is seen by the concluding paragraph. How such a transaction can possibly be construed as an undertaking to answer for the debt of another, I am unable to perceive.

Nor do I think the Court erred in the refusal to charge as requested in relation to the account charged to Hughes, or in the charge actually given. Evidence had been given on both sides as to whom the credit was given, and the reason of the account being kept in the name of Hughes: and the Court left the whole question very fairly to the jury.

Error is assigned upon the refusal of another request, which amounted substantially to this: That the *ex parte* understanding of the vendee, of which the vendor had no knowledge, respecting the contract for the delivery of the goods to defendants' employees, should prevail against that of the vendor, although goods to a large amount had been received by the vendees under such contract

Digitized by Google

This can hardly be held to be good law or sound morals, so long as the vendee neglects or refuses to restore the vendor to his original position by restoring the property received, or by paying for it. An agreement in law would most clearly exist in such a case, arising from the duty to make good the party deprived of his property; and the Court therefore rightly refused the request, and correctly charged in response to the request, that "the defendants are not liable, although the plaintiffs may have supposed them to be so, if the jury find that there was no express or implied agreement that they should become so, for the reason that the goods were not delivered to them."

I see no error in the charges and refusals of the Court, and think the judgment should be affirmed.

MANNING J. concurred.

CAMPBELL J.:

Plaintiffs in error were sued for the price of goods furnished by defendants in error to different persons in pursuance of an alleged arrangement. Paul, Farwell & Co. were contractors upon the Flint & Pere Marquette Railway, and the goods were furnished to laborers and workmen in their employ. It was a question before the jury whether these goods were furnished upon the credit of Paul, Farwell & Co., or upon the credit of other parties who, according to some of the evidence in the case, were bound to make advances. There was no evidence of any written promise to pay the debt, but there was some evidence tending to prove a recognition of it, and also contradictory evidence on this point. The Court charged that, if the goods were furnished under the original arrangement, or if Paul, Farwell & Co. subsequently assented to the goods being charged to them, in either case they would be liable.

Digitized by Google

I think the first branch of this charge was correct, but the latter clause was erroneous. If the debt was originally the debt of another, the promise to pay it is required by the statute of Frauds to be in writing. In the absence of a written undertaking, I do not see how there could be any cause of action upon any such subsequent assent. Upon the other points presented I think there was no error. But for this charge I think judgment should be reversed, and a new trial granted.

CHRISTIANCY J. concurred in this opinion.

The Court being thus equally divided, the judgment was affirmed.

Farmers and Mechanics' Bank of Michigan v. City of Detroit and others.

Ratification by United States of deed by Governor and Judges. — Where the Governor and Judges of the territory of Michigan deeded a lot in Detroit, in 1816, in exchange for a conveyance by the grantee of another lot to the United States, and the United States took possession of the last mentioned lot, and occupied it for fourteen years and more, it was held that this ratified and made valid the deed by the Governor and Judges even if originally invalid.

Correction of deed: failure of consideration. — A mistake in description occurred in a deed given on behalf of the United States, in the city of Detroit, in exchange for other lands. The city was afterwards, by act of Congress, made the donee of the undisposed of lands on the city plan. To a bill filed against the city to correct the mistake, it is not a valid defense that the title to the land conveyed to the United States in exchange subsequently failed.

Bona fide purchaser. — Nor can the city, as donee of the United States, nor persons who took a conveyance from the city with notice, claim the protection of a bona fide purchaser against such correction.

Laches in applying for correction of mistake. — A mistake occurred in the description of lands in a deed given in 1816. The grantee took possession of the land intended to be conveyed, and he and his grantees retained it until 1848, when one who had succeeded to the rights of the grantor went into possession. Bill was filed in 1851 to correct the mistake. Held, that the remedy was not lost by laches.

Digitized by Google

FARMERS AND MECHANICS' BANK v. CITY OF DETROIT.

Bill to correct mistake: parties. — Where the title of the grantee in such deed has been acquired by complainant without warranty, such grantee is not a necessary party to a bill to correct the mistake.

Heard May 5th. Decided July 15th.

Appeal in chancery from Wayne Circuit.

The bill was filed in 1851, to correct a mistake alleged to have occurred in a deed bearing date December 31, 1816, given by the Governor and Judges of the territory of Michigan to Benjamin Woodworth. The mistake consisted in describing therein, as the premises granted, a lot which had before been conveyed by the Governor and Judges, instead of adjoining premises, which it was understood and agreed should be granted by it.

This deed was given to Woodworth in exchange for a conveyance by him of lot 49 on the old plan of Detroit. The United States went into possession of lot 49, and Woodworth also took possession of the lot in controversy. Complainants' title to this lot was acquired through the foreclosure of a mortgage given by Woodworth in 1838. John Long and Seneca McGregory were made defendants to the bill, and it was alleged that, in 1851, the Mayor, Recorder and Aldermen of the city of Detroit, claiming to act under the authority of an act of Congress entitled "An act supplementary to an act to provide for the adjustment of title to land in the town of Detroit and territory of Michigan, and for other purposes," approved August 29, 1842, executed a deed of said premises to the Mayor, Recorder, Aldermen and Freemen of the city of Detroit, who soon after conveyed to Long & McGregory, all parties being fully informed of complainants' rights.

The Court below made decree for complainants as prayed.

W. Gray, for complainants.

T. H. Hartwell, City Attorney and *L. Bishop*, for defendants, made the following points:

That Woodworth was the proper person to contest the questions involved in this suit, and should have been

Digitized by Google

made a party. *Story Eq. Pl.* §§ 72–78; *Daily v. Litchfield*, 10 *Mich.* 29.

That to maintain the bill complainants must show that Woodworth performed the contract for exchange on his part. This suit is really a suit for specific performance. There is no sufficient evidence he ever gave a deed; and it is proved that an adverse claimant recovered the lot in 1842.

The Governor and Judges had no power to convey to Woodworth. He was not a sufferer by the fire of 1805. The act of April 21, 1806 — 2 *Stat. at Large*, 398 — conferred no power to make such exchange, and no other act is referred to giving it.

Defendants are bona fide purchasers without notice. There was no title of record adverse to that of the government when the land was conveyed to the corporate authorities of Detroit, and by them to Long & McGregory.

The parties alleging the mistake have been guilty of such laches as should preclude the relief sought: — *Story Eq. Juris.* § 1521 *a*; 1 *Paige*, 100; 8 *Pet.* 420; 3 *G. & J.* 491; 1 *Edw. Ch.* 343; 3 *Edw. Ch.* 304; 1 *Bail. Ch.* 458; 4 *J. J. Marsh.* 610; 5 *Ala.* 90; 8 *Port.* 211. They were also guilty of inexcusable negligence and carelessness in taking this alleged title, and delaying to assert their rights; and in such cases equity will grant no relief: *Story Eq. Juris.* §§ 105, 146, 150, 151; 5 *Humph.* 529; 3 *Ala.* 352; 1 *B. Monr.* 177.

MANNING J.:

The mistake in the deed from the Governor and Judges of the territory of Michigan to Benjamin Woodworth, of the 31st of December, 1816, is clearly established by the evidence; and the decree of the Circuit Court must be affirmed, unless some one of the objections insisted on by defendants stands in the way, and is an insurmountable

Digitized by Google

obstacle to giving the relief asked by the bill. These objections may be stated as follows: 1st. Want of power in the Governor and Judges to convey the premises in dispute: 2d. That Woodworth never deeded to the United States lot 49, which he was to convey to the government in exchange for the premises in dispute: 3d. If there was such a deed, that Woodworth's title to lot 49 afterwards failed, and the premises were recovered in an action of ejectment on a prior title: 4th. That defendants are bona fide purchasers: 5th. Laches on the part of complainants in not filing their bill at an earlier day: 6th. That Woodworth should have been made a party.

If we should concede the first objection — which we do not — that the Governor and Judges had no power, under the act of 21st of April, 1806, to sell or exchange the premises in dispute, the government ratified the act of the Governor and Judges by taking possession of lot 49 and the buildings erected thereon by Woodworth, and continuing to occupy the same for fourteen years and more — how much longer does not appear.

The evidence proves a conveyance of lot 49 by Woodworth to the government.

Admitting the failure of Woodworth's title to lot 49 ultimately, it is no defense in the present suit. The government is not a party in this litigation, and the city of Detroit is not a purchaser of the premises in dispute. In consequence of the mistake the legal title passed to the city under the supplementary act of Congress of 29th August, 1842, making the city the donee of all public lands mentioned in the original act, that had not been disposed of, except the lots on which the court house and jail had been erected, after satisfying all claims under the original act, &c.

The defense of bona fide purchaser is not set up in the answer. The city, as we have stated, is not a purchaser but a donee; and the answer admits that Long

Digitized by Google

& McGregory knew of complainants' claim when they purchased of the city.

There was no laches on the part of complainants. Woodworth and those claiming under him were in possession until 1848, when the city took possession, and the bill was filed in 1851.

Woodworth is not a necessary party. Had the mortgage through which complainants claim Woodworth's interest in the premises contained a warranty, which it does not, the objection would probably have been a good one had it been taken in season, as such warranty would have given him an interest in the suit.

The decree of the Court below must be affirmed, with costs.

CHRISTIANCY and CAMPBELL JJ. concurred.

MARTIN CH. J. did not sit in this case.

Alexander Van Renselaer v. John L. Whiting and another.

Setting aside judgment as to one joint debtor. — Where the Circuit Court makes an order vacating a judgment as to one of two joint debtors, its effect is to vacate it as to both.

Review of matters of discretion. — Where the Circuit Court has power to vacate judgments, it is a discretionary power; and its action can not be reviewed by the Supreme Court.

Heard May 11th. Decided July 15th.

Certiorari to Wayne Circuit.

September 17th, 1861, Van Renselaer recovered judgment against John L. Whiting and J. Tallman Whiting, for $2793.83, in an action of assumpsit on the common counts. In December following J. Tallman Whiting made

Digitized by Google

affidavit that he was only justly liable for $798 of the judgment, and explained his failure to make defense in due time; and upon this and others moved that the judgment as to him be vacated. The Circuit Court, after hearing the parties, on July 19th, 1862, made the following order:

"A motion to set aside the judgment in this cause having been argued by counsel and submitted, and the Court having duly considered the same, it is ordered that said motion be and the same is hereby granted, and that the judgment heretofore entered in this cause be and the same is hereby set aside and vacated, as to the defendant J. Tallman Whiting."

Van Renselaer sued out certiorari to remove the proceedings on this motion to this Court.

Newberry & Pond, for plaintiff in error:

The term at which said judgment was rendered and entered having expired, said Circuit Court had no jurisdiction to vacate or to modify the same, except in correction of some clerical error or omission, and its action in the premises is therefore erroneous: — 2 *Bl. Com.* 314; 2 *Bacon Abr.* 484, *Error, I*, 6; 2 *Tidd Pr.* 860; 25 *Wend.* 222; 1 *Wheat.* 304; 6 *How.* 31; 20 *Mo.* 584; 1 *Bibb*, 346; 3 *Scam.* 170; 7 *Ired.* 346; 5 *Jones*, 415; 1 *Smith*, 287; 13 *S. & M.* 153; 26 *Ala.* 325; 5 *Ark.* 23, 558, 576; 14 *Ark.* 203; 25 *Mo.* 351; 25 *Mo.* 401; 15 *Gratt.* 64; 8 *Cal.* 521; 1 *Ohio*, 168; 20 *Ohio*, 344.

The time within which to move for a new trial is limited by Circuit Court Rule 31, and if this time is not extended (Rule 72,) all power of the Court to vacate judgment is gone: — 3 *Pick.* 512; 2 *Gray*, 402; 12 *Md.* 450; 22 *Ill.* 173; 3 *Green*, 124; 2 *H. & G.* 79. The Court has no discretion to depart from these "laws of the Court," unless such discretion is expressly reserved.

Digitized by Google

S. D. Miller, for defendants in error:

The writ of certiorari should be dismissed, as improvidently issued: — 5 *Mass.* 420; 15 *Wend.* 198; *Matter of Lantis*, 9 *Mich.* 324.

The Circuit Court had the power to set aside the judgment, notwithstanding the lapse of a term: — *Loree v. Reeves*, 2 *Mich.* 133; *Hurlbut v. Reed.* 5 *Mich.* 30. The theory that a judgment can not be reversed by the Court rendering it after the term has elapsed; originated under a judicial system very different from our own. Under that system, after the *postea* was delivered, the roll was returned to the Court from which it was sent, and the Court trying the cause had no further control: — 2 *Bac. Abr.* "*Error*," 485; 2 *Chit. Bl.* 298.

MARTIN CH. J.:

We do not consider it necessary to discuss the question whether certiorari will lie in cases like the present, as upon the merits we think the writ must be dismissed. The effect of vacating the judgment as J. Tallman Whiting was to vacate it as to the other defendant also; and there is now no judgment in the case. The parties have therefore now all the rights in the Circuit Court which they would have in any case of the vacation of a judgment.

Where the Circuit Courts have power to set aside verdicts, grant new trials and vacate judgments, it is a discretionary power, the exercise of which we can not review. The present case comes within this principle.

The certiorari must be dismissed, with costs.

CHRISTIANCY and CAMPBELL JJ. concurred.

MANNING J.:

The order in terms sets aside the judgment as to J. T. Whiting only. I think it should have set it aside as

Digitized by Google

to both defendants, and granted a new trial. My brethren think that is the effect of the order, but it does not so read. The only remedy in cases of this description, where an error has been committed that can be reached by this Court, it seems to me is by mandamus.

Writ dismissed.

Thomas J. Olcott v. Albert S. Hanson.

Payment: proof of, erroneously excluded: curing the error. — Action on a promissory note. Defense, set off and payment. The defendant offered evidence of a payment of five dollars, which was excluded by the Court, on the ground that the item was not mentioned in the bill of particulars of set off. Plaintiff having recovered judgment, was allowed by the Court to remit five dollars of the amount, with a view to curing the error. It was held that the error was not cured. By rejecting this evidence, the Court in effect denied the defendant the right to prove any item of payment without notice; and the Court, therefore, can not say what other payments may have been excluded by this ruling.

Amending verdict. — A jury brought in a sealed verdict, "We find for the plaintiff the full amount claimed by him on the note." Under objection by defendant's counsel, the plaintiff's counsel was allowed to state to the jury what the amount was, and they then returned a verdict for that amount, in due form. Held, per MARTIN CH. J., that it was unobjectionable.*

Heard May 13th. Decided July 15th.

Error to Washtenaw Circuit, to which the cause had been appealed from a justice of the peace.

Hanson brought suit against Olcott, on a promissory note of $85, dated March 28th, 1859, on which several indorsements had been made. Olcott pleaded the general issue, with notice of various items of set off.

On the trial in the Circuit Court, June 17, 1863, the defendant offered evidence of a payment of five dollars, made on the note in November, 1860. The plaintiff objected, for the reason that the bill of particulars of set off

* See the case of *Sleight v. Wandlass*, supra.

Digitized by Google

contained no item of five dollars, for money paid in November, 1860. The Court sustained the objection, and ruled that it was not competent for defendant to prove any payments not mentioned and set forth in said bill of particulars.

After the cause was submitted to the jury, they returned a sealed verdict as follows: "We find for the plaintiff the full amount claimed by him on the note." The Circuit Judge asked the foreman what amount of damages they assessed; the foreman replied that the jury did not have the note, and did not remember the amount, but that it was the amount claimed by the plaintiff. The Court then instructed the jury that it was necessary that they should find some specified sum, and inquired of the counsel of the respective parties if they objected to a retirement of said jury to fix upon the amount; but the counsel for the defendant objected to any addition to or amendment of the sealed verdict in matter of substance. The counsel for the plaintiff then stated that the amount claimed was $32.90, and thereupon the foreman stated that was the amount the jury found. The Court then directed the jury to render their verdict, stating the amount at which they assessed the plaintiff's damages; to which direction the counsel for the defendant excepted. The jury then rendered a verdict in favor of said plaintiff against the defendant for the sum of thirty-two dollars and ninety cents.

An order was afterwards entered, giving defendant until the first day of August, 1863, to prepare and serve a bill of exceptions; and a bill was settled and signed prior to that day. August 4, 1863, all proceedings on the judgment were stayed, on defendant's motion, for twenty days, and on August 24th, the following order was entered: "In this cause, on motion of Norris & Ninde, attorneys for the plaintiff, after hearing Messrs. Beakes & Abel, attorneys in opposition thereto for the defendant, it is

Digitized by Google

ordered that the plaintiff have leave to remit five dollars (proof of which item of five dollars was ruled out on the trial,) from the verdict and judgment heretofore taken and recorded in this case, so that execution will issue in this case, if at all, for the sum of twenty-seven dollars and ninety cents, with costs of suit."

Writ of error, to remove the cause to this Court, was sued out August 13th, served August 14th, and return thereto made August 17th.

H. J. Beakes, for plaintiff in error, to the point that remitting the five dollars did not cure the error of rejecting proof of the payment, cited:—2 *Str.* 1110; 2 *Wm. Bl.* 1300; 1 *Bulst.* 49; 4 *Conn.* 309; 1 *Marsh.* 475; 17 *Johns.* 111; 3 *Wend.* 356; 4 *Denio*, 311; *Sedg. on Dams.* 578; 1 *Chit. Pl.* 338–9. In this case the Court can not know that the ruling did not prevent defendant from proving other payments.

Norris & Ninde, contra, cited:—5 *Met.* 205, 212; 6 *S. & M.* 507; 7 *How.* (*Miss.*) 675; 4 *Yerg.* 565. Even in a court of error the plaintiff should have been allowed to remit:—1 *Cush.* 141; 5 *Halst.* 222.

MARTIN CH. J.:

That the Court erred in refusing to allow the defendant to prove the payment of five dollars upon the note in suit, because it was not included in his bill of particulars, is unquestionable. Payment can always be proved as a matter of direct defense. Except in this particular, the jury were in no way misled on the trial. But while the case was still within the control of the Circuit Court—for it had suspended all further proceedings therein until the 24th of August—and evidently during the same term, leave was granted, on the 24th of August, to the plaintiff to remit the amount of five dollars from the judgment. This cured the error, unless the indecent haste of suing

Digitized by Google

out the writ of error before the party was entitled to it, as I think — unless two courts can have jurisdiction of the judgment at the same time — and procuring a return to the writ within three days after its service, and while the cause was suspended in the Circuit Court, secured to the plaintiff in error some undue advantage. I think it did not.

There was no error in the manner of taking the verdict. The jury had agreed upon it, as the amount due on the note; but by some accident they had no data from which to compute that amount. When instructed by the Court that they must find a sum certain, and were informed in open Court of the sum, they rendered their verdict accordingly. They acted in good faith, and honestly; and there is no pretence of corruption or intermeddling. It is true that a jury who are permitted by the Court to disperse after having found and sealed a verdict, can not disperse before one is found; but no formal verdict is ever expected to be found. That is put into shape in open Court; and I see no objection to their coming into Court, as in this case, saying that they find for the plaintiff the full amount claimed upon the note, and upon receiving information from the Court, or of counsel in the presence and with the approbation of the Court, amending their verdict accordingly. The paltry amount in controversy of itself would incline me to let the verdict rest, unless I could see some important principle of the law had been violated.

I think the judgment should be affirmed.

CAMPBELL J.:

I agree with my brethren that there was error in rejecting proof of a payment of five dollars, on the note sued upon. But I cannot perceive how a defendant in error, who has taken a judgment founded on such an erroneous ruling, can defeat the jurisdiction of this Court by

Digitized by Google

indorsing down his judgment after error brought. Neither is it manifest that justice has been done by the reduction. In rejecting this item, the Court did it on the ground that no items of payment could be received without notice. A party after such a ruling is not obliged to offer proof of further items, and no presumption can be raised that he had no further proofs to offer.

The small amount in controversy may render it improper, in a moral point of view, for parties to protract litigation; but, until our jurisdiction is limited, I think we have no right to declare any controversy allowed by law as *infra dignitatem*. I think the judgment should be reversed.

CHRISTIANCY J.:

By rejecting the item of payment in question, on the ground that it was not contained in the defendant's bill of particulars of set off, the Court in effect denied the defendant the right to prove any item of payment without notice. We can not therefore say what other payments may have been excluded by this ruling. On this ground I concur with my brother Campbell that the judgment should be reversed.

MANNING J. did not hear the argument.

Judgment reversed.

Eliza Perkins v. Sebra Perkins.

Alimony: construction of statute authorising decree to be changed. —The statute —Comp. L. § 3249—which provides that, after a decree for alimony, the Court may, from time to time, on the petition of either of the parties, revise and alter such decree, &c., must be construed as only authorizing the change on new facts thereafter transpiring, which are of such a character as to make the change necessary to suit such new state of facts.

Digitized by Google

PERKINS v. PERKINS.

Equity: proof of case not stated in pleadings. — Petition to revise and alter a decree for alimony. Facts proved on a reference under such a petition, which are not made a ground for relief in the petition, can not be noticed by the Court.*

Heard December 5th, 1863. *Decided July 15th.*

Appeal in chancery from Washtenaw Circuit.

The complainant having obtained a divorce from the defendant, with decree for the payment by him of $1000 alimony, the defendant afterwards filed his petition for a revision and alteration of this decree, giving as a reason why it should be changed, that he was not aware when the decree was rendered that the complainant would also be entitled to dower in his real estate, and that, in view of that right, the sum awarded was altogether too large. The Court below ordered a reference to take proofs under this petition, and proofs were taken showing the value of the dower, the amount of defendant's property at the date of the decree, that it had since been all expended, and that he had become insane. On this testimony being filed, an order was made wholly vacating the former decree for alimony, and complainant appealed.

O. Hawkins and *T. M. Cooley* for appellant.

Joslin & Blodget for petitioner.

MANNING J.:

The petition is under § 3249 of the Compiled Laws, which provides that "after a decree for alimony" "the Court may, from time to time, on the petition of either of the parties, revise and alter such decree, respecting the amount of such alimony or allowance, and the payment thereof, and also respecting the appropriation and payment of the principal and income of the property so held in

* See on this point, *Thayer v. Lane*, Wal. Ch. 200; *Cicotte v. Gagnier*, 2 *Mich.* 381; *Warner v. Whitlaker*, 6 *Mich.* 133; *Bloomer v. Henderson*, 8 *Mich.* 395; *Barrows v. Baughman*, 9 *Mich.* 213; *Wurcherer v. Hewitt*, 10 *Mich.* 458; *Dunn v. Dunn*, 11 *Mich.* 284; *Peckham v. Bufam*, 11 *Mich.* 529.

Digitized by Google

trust, and may make any decree respecting any of the said matters which such Court might have made in the original suit." The section must be construed to mean one of two things. It may be construed as empowering the Court to change the decree for alimony, from time to time, on facts existing when the decree is granted, or on new facts thereafter transpiring; or as only authorizing a change on the latter, when they are of such a character as to make it necessary to suit the new state of facts. The last we think is the true construction. We can not suppose the first to have been in the mind of the Legislature, as it would virtually take away the right of appeal, which the law gives to the party who may feel himself, aggrieved by the decision of an inferior tribunal, and subject the rights of the parties to the discretion of the Court making the decree, however arbitrarily or capriciously exercised. But as various circumstances might occur after alimony granted — as adultery on the part of the woman, or the loss of property by some inevitable accident on the part of the man, and the like — we are led to believe that the statute was intended to provide for such new circumstances, and that that was all the Legislature had in view in enacting it: that it was not designed to affect the right of appeal, or to give to the Court granting alimony power to review and to reverse or modify its own decree. Such a power would be unprecedented, and out of the ordinary course of judicial proceedings.

The only ground stated in the petition for changing the decree, is, that defendant did not know, at the time it was made, that complainant would be entitled to dower in his real estate. If defendant was dissatisfied with the decree, he should have appealed; and not having done so, the error, if there be one, can not be corrected, after the time for appealing has expired, by petition under the statute.

There is evidence taken under the petition of matters

Digitized by Google

transpiring after the decree, but we can not notice it, as the facts proved are not made a ground for relief in the petition, which is defective in substance.

The order opening the decree for review, and the subsequent order denying alimony, are reversed, with costs to complainant of both courts.

CHRISTIANCY and CAMPBELL JJ. concurred.

MARTIN CH. J. did not sit in this case.

Julia Beaubien and others v. Mary A. Cicotte and others.

Evidence on probate of will: alleged fraud: res gestae. — Where a will is contested on the ground of fraud or undue influence, a very broad inquiry is permitted into the whole chain of circumstances attending its preparation; and the transaction must be deemed to embrace all the immediate preliminaries.

Where the instructions for executing a will contemplated that the attending physician should be sent for to attest it, the *res gestae* necessarily embrace this as one of the steps actually taken; and what message was sent, or received and acted upon, is therefore admissible, as a circumstance which may have weight or not, as made significant or not by other proofs.

Evidence: inquiry as to conflicting statements of witness. — The testimony of the attending witness, as to the nature of the message sent, being somewhat contradictory, it was held to be proper, on cross examination, to call his attention to his testimony on a former trial, and to ask him if he did not then state that a particular message was brought.

Evidence: statements of witness impeaching his candor. — A question to a witness whether he did not, on a former trial, testify that he said yes and no, and played good Lord and good devil, because he did not know into whose hands he might fall, is admissible, as going directly to his fairness and candor.

Evidence: limit to re-examination. — A witness on his cross-examination testified, that some years before he had a conversation with the deceased; but he gave no part of the conversation, and it did not appear to have had any bearing upon the controversy. It was held not competent for the opposite party, on re-examination, to inquire what was said by the deceased on that occasion.

Probate of will: appeal: discharge of proponents to make them witnesses. — If the Circuit Court, on appeal from an order of the Probate Court refusing to admit a will to probate, can allow part of the proponents to renounce and be discharged, in order to become witnesses, the power to do so is discretionary, and a refusal can not be reviewed on error.

Digitized by Google

BEAUBIEN v. CICOTTE.

Evidence: refreshing witness's recollection. — In order to refresh the recollection of a witness, his attention may be called to his evidence on a former trial, and counsel's minutes of the former testimony read for the purpose.

Evidence: will: undue influence: declarations of testator. — A will being assailed for fraud and undue influence on the part of the wife, statements of the testator that he regretted his marriage, that he was not master at home, that he was afraid of his wife, and was compelled to submit to her demands, or otherwise there would be trouble in the house, are admissible evidence.

Evidence: impeachment of witness by contradictory statements. — Where a subscribing witness to a will testifies to its due execution by a competent testator, evidence of his statement, on another occasion, that it was not worth the snap of his fingers, is competent by way of impeachment.

Evidence: will: undue influence: proof of terms on which the family lived. — A will which disinherited the testator's relatives in favor of his wife and her relatives, being assailed for undue influence and want of capacity, it was held competent to prove the wife's abuse of the husband's relatives, and her quarrel with him about a former will by which he had made provision for them. A wide range of inquiry into the family relations, and the terms upon which they lived is allowable in these cases.

Evidence that the testator made no complaint of any importunities on the part of his relatives, is also admissible in such case, where it appeared that the wife had made charges to him of their rapacity.

Evidence of former wills, and of other pecuniary arrangements for the wife, is also admissible, as having a bearing upon the question whether the testator has understandingly, and of his own free will, changed his settled views.

Will: what necessary to its validity. — A will is not valid unless the testator not only intends, of his own free will, to make such a disposition, but is capable of knowing what he is doing, of understanding to whom he gives his property, and in what proportions, and whom he is depriving of it as heirs, or as devisees under the will he revokes.

Evidence: its general purpose. — In all testimony the object of the law is, to enable the jury to know all that the witness knows which is pertinent to the issue; and every rule of evidence is designed to secure this end.

Evidence: mental capacity: opinions of witnesses. — There is nothing in the nature of inquiries concerning mental capacity which requires juries to be informed, of necessity, by other than ordinary witnesses.

Therefore in an inquiry concerning mental capacity to perform a certain act, witnesses who are not experts may testify to their opinions upon the question in controversy, based upon their own observations.

It is proper to put the question to the witness in such a way as to call for his opinion upon capacity with reference, as near as may be, to the very act or kind of act in dispute.

Accordingly, on a question of capacity to execute a will, it was held proper to ask a witness who had seen and conversed with the testator near the time of executing the instrument, whether, from the conversation then had with him, and from what he then saw of him, he was capable of comprehending or understanding a document of any considerable length, if it had been read to him.

Also, what capacity the testator had, at the time the witness saw him, to understand business matters.

Digitized by Google

Also, whether, in the opinion of the witness, the testator was, at the time, capable of holding a conversation like one testified by another witness to have taken place.

Heard May 17th, 18th and 19th. Decided July 15th.

Error to Wayne Circuit.

Joseph A. Moross, Julia Beaubien and Rose J. Moross, presented to the Probate Court for the County of Wayne, for probate and allowance, an instrument dated January 12, 1858, purporting to be the last will and testament of Antoine Beaubien, and attested by Isaac S. Smith, Israel A. Moross and F. Provost as subscribing witnesses. The will gave the whole of the property of the testator to his wife, Julia Beaubien, during her life time, with remainder to her children by a former marriage, Mary Millette, Rose J. Moross, Napoleon Millette, Joseph Millette and Israel Millette. Joseph A. Moross was named sole executor. On the hearing in the Probate Court, the will was disallowed, and the proponents appealed.

In the Circuit Court an issue was framed for trial by jury; the respondents, who were heirs at law of said Antoine Beaubien, denying generally the execution of the will, and also averring that at the time of the alleged execution thereof he was not of sound mind; that he was induced to sign it by undue influence exerted over him by said Julia Beaubien, now the wife of Thomas Coquillard, and others, at a time when both his mind and body were greatly enfeebled by old age and disease, and that the same was not his free, voluntary and intelligent act; and also that he was induced to sign the same by fraud and undue means.*

The case as presented in the Circuit Court, is so fully set forth in the opinion, that it is deemed unnecessary to give in this place anything except the testimony of Bishop LeFevre, upon which the principal questions in the case

* As to what it is necessary for the propounders to aver in framing such an issue, see this case, 8 *Mich.* 9.

Digitized by Google

arose. This testimony was given after the subscribing witnesses had testified to the circumstances attending the execution of the will, and Robert P. and James B. Eldredge had been examined relative to the drafting of the same, and the instructions therefor.

Peter P. LeFevre, called for the contestants, testified as follows: "I knew Antoine Beaubien during his life-time, from 1842 until his death. I have held the office of Bishop of Detroit for the Catholic Church. Beaubien was a member of that church, and I was very intimately acquainted with him."

Witness then proceeded to state in detail the nature of his relations to Mr. Beaubien, for several years previous to his death, his degree of intimacy with him and what business and other transactions they had together, all tending to show the nature and degree of Beaubien's mental capacity when in health; and also testified to his opinion as to said capacity.

And he further testified, in substance, that sometime in the year 1853 said Beaubien came to him, and complained of the conduct of Mr. Meldrum, who was then acting as his agent, attending to his affairs. He said that Meldrum had got him to sign some paper which divested him of all legal right to his property, and on account of which he (Beaubien) threatened to, and did afterwards, commence a suit against said Meldrum. That the Chicago Beaubiens were at the same time carrying on a suit against said Antoine and others, in relation to the title of his farm, and the old man appeared in much trouble.

That about this time said Antoine informed witness that Capt. Cicotte had advised him to sell his property, and had informed him that Van Dyke would purchase it. That Beaubien afterwards came to him, and said that Van Dyke offered him $54,000, but insisted upon his consulting with witness. That witness advised him to accept the offer. That papers were drawn. They were

Digitized by Google

brought to witness's room, and witness explained them to Beaubien; and also that Van Dyke took the purchase subject to the litigation with Meldrum and that with the Chicago Beaubiens, and the papers were then executed. Witness afterwards saw Meldrum for Van Dyke, and assisted in settling the litigation with him.

And witness then further testified as follows: "After papers were signed by Mr. and Mrs. Beaubien, I told them they did not think very likely what they had done. That Mrs. Beaubien, by signing the deed, had signed away all right to his property. That if he, Mr. Beaubien, should die to-morrow, they might put his wife out of doors without any provision. He appeared to be startled. I said I know you did not intend to leave her without provision. He said, no. I said it was for him to provide for her. He asked what he should do? I said, consider you were at the point of death, and do for her as you would then wish to do for her. I told him: your wife is yet young, and has five children. He asked me what he ought to give her? I said, it is for you to say. He asked me if $20,000 was sufficient? I said, yes. I then counselled him to leave the $20,000 to her children, so that they should have something when they became of age. He said he would do it. I told him, as he might die at any time, he had better do it before leaving my room. Van Dyke, J. M. Howard, and Mandell were there, and the paper was drawn in my room, and executed by Mr. Beaubien."

Contestants' counsel here called upon Mr. Howard, proponents' counsel, to produce that agreement.

Mr. Howard replied that it was not in Court, but explained that it was an agreement by Mr. Beaubien to settle $20,000 on his wife for life, and on her children after her death.

Question by contestants' counsel. Do you know what Mr. Beaubien claimed in regard to the Meldrum deed?

Answer. He complained various ways about it, and

Digitized by Google

came frequently to see me about it. Don't know what he claimed, or how the deed was obtained. This deed was made without my knowledge. Meldrum also came to see me about it. Mr. Beaubien had frequently expressed to Meldrum his dissatisfaction. Meldrum came to me, and said Beaubien was coming also. They brought the papers. I read and explained them as well as time would permit. Beaubien was not satisfied. It was a trust deed or contract. Can't say what Beaubien claimed as to how they were obtained. Beaubien came again and expressed dissatisfaction. And some three weeks afterwards he came again. Van D. said as people talked so much, he was afraid that Beaubien might be dissatisfied, and he did not want to keep the trade if he was, and wanted to give back the papers and every thing should be null and void.

And witness further testified as follows: "Shortly after the conveyance to Mr. Van Dyke, Mr. Beaubien came to see me again about a will. I said to him, Mr. Beaubien, you have never done much for your relations. You have educated some of them, but you have not left them much. Many of them are poor. I told him, I should be sorry for him to leave this world, and leave any of his relations with uncharitable feelings. That he had made no provision for them by will. I then counselled him to make a will. I then named several of the Beaubiens. I named Henry Beaubien, Louis Beaubien, and the family of Lambert Beaubien. I also mentioned Mrs. Dr. White, as the doctor had said that he had never given her anything. He mentioned Johnny Campau himself, some of the Labidies, others of the Lambert Beaubien family. I mentioned all the children of Lambert Beaubien. I believe he mentioned Veronique Cicotte, sister of Lambert Beaubien. He seemed to assent to what I said. Mr. Van Dyke came, I believe next day, to take the notes of the will to be drawn up. He took notes and was to draw up the will at his room, and Mr. and Mrs. Beaubien were to go there.

Digitized by Google

Afterwards, Van Dyke said they went to Howard's office." (A copy of the will of March 10, 1854, was here shown to witness, which Mr. Howard, counsel for the proponents, admitted to be a copy of the will drawn up by him.)

The witness, referring to this will, further testified: "I think the provisions of this will for the various members of the Beaubien family are about what we talked over at the interview. This conversation was some time after the Van Dyke transaction. I never knew anything about this will, except that Van Dyke told me that Howard had drawn up the will. Beaubien never talked with me about the will after that. I heard no more of any other will until after his death, and then I was surprised, because I never heard of it."

Said witness then further testified, as follows:

"I did not see Mr. Beaubien so often the fall before he died as prior to that time. Don't recollect of seeing him that fall before he was sick. I heard he was sick, and a few days after New Year's went to see him. He was sitting upon a settee in the sitting room. Whether he was lying down, I can't say. I talked with him, and he was quite sick, very sallow as to complexion, and had no courage. He seemed to pick up a little when I spoke to him. Mrs. Beaubien presented us a couple of glasses of wine. I asked him to drink with me, and he said, I don't drink. He stood up when I drank my glass, and bowed, then sat down and conversed a little while. The conversation was a very common and uninteresting one, mostly with Mrs. Beaubien, who talked, while Mr. Beaubien listened, and sometimes, when addressed, he replied. I remember Mr. Beaubien said he had taken some kind of vegetable pills, and I replied I thought harsh medicines would not be good for him, an old man. This was addressed to Mrs. Beaubien. She seemed to like it. He said nothing about the pills. I thought the way he looked to me he would not recover. He seemed to be very low

Digitized by Google

spirited, as a man in his condition would be. The conversation was particularly between his wife and myself. Can't remember all that passed, but something about his health. Don't remember that he asked me any questions at all. When we addressed him, he would answer, but very short. The man was sick, was low spirited and very weak. My visit was the common length of an ordinary visit. Most of the talk was with Mrs. Beaubien. Did not talk with Mr. Beaubien very much. He appeared very sick. Don't think his capacity was impaired, except by his sickness. It was very much impaired. He was very sick. When I suggested about his recovering he seemed to doubt it. Seemed to have a presentiment of dying very soon. At other times, when he was not sick, he was very talkative. Then I thought he could not talk much, was very low spirited, and seemed to think almost certainly he was going to die. Generally opened his mind very fully to me, but now could not. Think he tried to talk more than usual, on account of my being there."

Counsel for contestants here proposed to read from his minutes of Ignace Moross's testimony, as to conversation with Beaubien the evening before the execution of will, and ask witness if, in his opinion, Beaubien was, at the time he saw him, capable of holding that conversation? Counsel for proponents objected, and after some discussion, the Court asked the following question:

From the conversation you then had with Mr. Beaubien, and what you saw of him, was he capable of comprehending or understanding a document of any considerable length, if it had been read to him in his own language?

To which question counsel for proponents objected, but the Court overruled the objection, and proponents' counsel excepted.

The witness answered: I think he could not; he was very much sunken. I don't think he could keep his attention long enough at a time to understand it. I advised

Digitized by Google

him to abandon worldly affairs, and attend to the matter of his eternal salvation. He did seem to understand simple, short questions. It seemed to be an effort when he had to answer four or five words. He seemed very feeble and weak.

The Court also proposed the following question:

What capacity had Mr. Beaubien at the time you saw him to understand business matters?

Proponents' counsel objected to the question. The Court overruled the objection, and proponents' counsel excepted.

The witness then answered: From all that I could see as to his capacity, he had very little capacity to understand business. He was very sick and weak, and whenever I asked him a question, he made an effort to answer, and did answer very short. Showed plainly he had very little capacity to transact business.

I can't tell the exact date of my visit, but it was before the 12th of January. It was before Epiphany, which is thirteen days after Christmas.

Question by contestants' counsel. In your opinion, was he at that time mentally capable of holding a conversation like this, (reading from his minutes of Ignace Moross's testimony, as follows, viz:) "I knew he said something at that time about old Cicotte, old White Head, that he was a plaguey old rogue. He said there was a provision for old White Head in that will, but he said he would not give him anything; he was an old rogue, and always sticking his nose in other people's business."

Proponents' counsel objected to the question. The Court overruled the objection and proponents' counsel excepted.

The witness then answered: I think he was not capable of holding that conversation. He was, I believe, incapable of holding any continuous conversation when I saw him. I was there perhaps three quarters of an hour, per-

Digitized by Google

haps a little less or a little more. Don't recollect that he asked me any question. Talked mostly to his wife. I sometimes addressed him, and he answered yes or no. I saw Mr. Beaubien once after this, either two or three days before his death; I could not say exactly, but shortly before he died, one or two days. He then received the last offices of the Church. Another clergyman went with me.

Contestants' counsel proposed to call witness's attention to his testimony on former trial, as to time of his last visit, to refresh witness's recollection.

Howard, for proponents, objects. Objection overruled and exception taken.

Counsel for contestants then read to witness his minutes of witness's testimony on former trial, that his visit was from four to five days before Beaubien's death. Wit. said he thought his testimony on former trial likely to be correct. He then proceeded:

I had hard work to wake him. He was on the bed, slumbering. He recognized me. Sometime after being awakened he sunk into slumber again. Whether under the influence of morphine, or not, I can not tell. I saw his end was approaching. I roused him more than once. Was in the room eight or ten minutes perhaps. Can't say exactly. I had no conversation with him then. I roused him up, and asked him how he felt. He replied he felt very badly, as near as I can remember, and sank down. The first time I saw him his memory was very weak. I saw that his memory had failed before he was sick, with age. He remembered some things that took place long ago.

The Court asked the witness: Was any conversation had which tended to test Beaubien's memory?

Witness answered: No. I had no such conversation. I did not ask him questions, but from his general condition should think he could not have had much memory.

Digitized by Google

Being cross-examined, the witness testified: "My first visit to Beaubien was between New Year's and Epiphany. I met him frequently that fall, and had conversations with him. Had no business with him, but had met him casually, and we had saluted each other in the usual way. Think my visit to Beaubien's before Epiphany was in the afternoon. My visit was a mere neighborly New Year's call. I had heard that he was sick, and it was one reason, and also to call on the family. I had no business, and no special religious object; a mere friendly pastoral visit. I found Mr. Beaubien sitting on a settee in the dining room. His wife was there, and some of the children, and, I think, Joseph Moross. I shook hands with Beaubien when I went in, and saluted him in the usual way. Asked him how he did. Asked him the nature of his sickness. I don't remember that he described his symptoms. Mrs. Beaubien answered. He appeared to be quite weak, and had a sallow complexion. Mrs. Beaubien said the vegetable pills he had taken had operated, and she proposed to get some more. The pills had been taken the night before or that morning. Can't say which. Mrs. B. said, they had just operated. I at that time apprehended that the disease might prove fatal. I may have told Mrs. Beaubien to take good care of him. I had a private conversation with her in the hall, and might have told her that I thought Beaubien's sickness might prove fatal. My visit was from one-half to three-quarters of an hour. I believe there was some conversation at that time about Mr. Lyell and his failure. It was with Mrs. Beaubien. She kept up the conversation. I might have asked Mrs. Beaubien how much money they had at Lyell's. I had heard that Beaubien had lost quite a large sum by Lyell. Mr. Beaubien in that conversation might have told me the amount, but the principal conversation was with Mrs. Beaubien. Can not remember whether Beaubien told me the amount. Sometimes from time to time he nodded,

Digitized by Google

and sometimes answered. I don't remember that Beaubien said that he believed that he had lost the money at Lyell's. Think Mrs. Beaubien said so, and he nodded or said something, and I have no doubt he understood it. I don't remember any other conversation at that time. Don't remember that we referred to any long-gone circumstances of Beaubien's life. I spoke about his health, the health of Mrs. Beaubien, and of the children. I believe, in substance, I told him he should lay the world aside, and think of that eternity where we all must go. That I might die before him. That is about all. He appeared to understand what I said about religious subjects. Appeared depressed. I don't remember that I stated on former trial that Mr. Beaubien enjoyed my religious advice and expressed a wish to live longer. He evidently desired to live longer, but feared he would die. I don't remember that when the glass of wine was presented to Beaubien he said he did not drink. I don't remember that I so testified. He said he did not want to drink. He was then capable of recognizing his friends and neighbors if they had come in. He recognized me. Recognized me the last time that I visited him. He appeared to be glad to see me at my first visit about the 6th of January. The conversation on that occasion was not an interesting one, and I may have stated on my former examination that the conversation, except upon religious subjects, was very uninteresting to me. His mind at that time was not deranged. I did not hear him use on that occasion one irrational expression. He was never deranged. * *

Mr. Beaubien had but little conversation. Could not infer that he was deranged. Spoke very briefly. I do not think he exhibited any want of memory as to the Lyell matter. Mrs. Beaubien did the talking. All of the conversation was with Mrs. Beaubien, and from time to time he would say "yes," or something of that sort. Did not see him but twice. Did not give him the last sacrament

Digitized by Google

myself. Told Mr. Sothers to do it, and I waited in the next room. It is according to the rules of the Catholic Church to give the last rites to a man, even if speechless. If a man is not speechless, but stupid, the priest can not hear confession, but he would give him absolution, hoping he may have understood. Priest will not take confession if a man is out of his mind so that he can not understand anything about it, but he would give him absolution. Can't say from my own knowledge, that confession was then had. When I went into the house on my first visit, the old man was up and dressed."

The above is, in substance, all the testimony of said witness in regard to his visit to Mr. Beaubien about the 6th of January, 1858.

The jury rendered a verdict against the will.

Newberry & Pond and *J. M. Howard*, for plaintiffs in error:*

The Court erred in admitting the questions propounded to the witness LeFevre.

The objection to these questions is, that they called for the opinion of the witness relative to a matter concerning which his opinion was not competent evidence.

It is undoubtedly now settled, that "upon questions of mental capacity even non-professional witnesses may give evidence, not only of specific facts and conduct falling under their own observation, but also of the *impressions* they derived *at the time*, involving to *some extent* matters of opinion." Per. Campbell J. in *White v. Bailey*, 10 *Mich.* 161. See also *Dewitt v. Barley*, 17 *N. Y.* 340.

An examination of the American authorities will however show:

1. That the admissibility in evidence of such opinions from non-professional witnesses, other than subscribing

* Only the arguments of counsel on the principal point involved in the case are given.

Digitized by Google

witnesses to wills, has not been settled without some considerable conflict.

2. That as to the extent and limit of the admissibility of such opinions, and also as to the proper form of questions calling for the same, there is still much conflict and confusion.

This conflict and confusion seem to have sprung from two causes, to wit:

1. Inquiries as to mental capacity most frequently occur in cases involving the establishment of wills. With this class of cases the English common law courts have never had anything to do. Exclusive jurisdiction over them has been, and is vested in the ecclesiastical courts. When, therefore, such jurisdiction was first given to American common law courts, either directly or by appeal from surrogate and probate courts, the ecclesiastical courts were naturally but inconsiderately looked to and followed as authority upon questions of evidence.

2. Two classes of cases have been inadvertently treated as a single class, to wit:

First Class. — Where the inquiry is as to sanity or insanity.

Second Class. — Where sanity is conceded, and the inquiry is as to degree of mental capacity.

To these two causes, and principally to the first, we think is to be attributed the fact that respectable American common law courts have permitted witnesses to testify to their opinions in general terms, that the party whose capacity was the subject of inquiry, "was fit or unfit to make a will." 11 *S. & R.* 141. "Was of sound and disposing mind, and capable of executing a valid deed or contract." 7 *Gill*, 10. "Was not in a sound state of mind" (where the question was as to degree of capacity). 5 *Iowa*, 875. "Was capable of making a contract or transacting important business." 23 *Penn.* 117. "Was competent to transact any ordinary business, and

Digitized by Google

had sufficient mind, memory, and understanding to make a valid deed or contract." 7 *Md.* 165.

It is unnecessary in this Court to stop to contend, either against the admissibility of opinions to the extent of the above cases— 10 *Mich. supra*,—or that the ecclesiastical courts are not to be followed by common law courts, as authority upon questions of evidence. See *Wright v. Latham*, 5 *Clark & Fin.* 692, cited in *Dewitt v. Barley*, 9 *N. Y.* 371. As an illustration where such evidence would lead, see *Crew v. Crew*, 3 *Hagg.* 123.

Before we can determine the extent or limit to which opinions of witnesses upon questions of capacity are admissible, or whether the opinion called for in a particular case is admissible in that case, we must, of course, settle the principle upon which such opinions are at all admissible. This done, the rest is comparatively easy.

We have been able to find but three or four cases in which the question is discussed with any degree of care or thoroughness.

[Counsel then proceeded to an examination and analysis of the cases of *Clary's Admr's v. Clary*, 2 *Ired.* 78; *Clark v. State*, 12 *Ohio*, 483; *Dewitt v. Barley*, 9 *N. Y.* 371; *same case*, 17 *N. Y.* 340, arriving at the conclusion that the admissibility of opinions upon questions of sanity and mental capacity is based upon the principle which admits opinions upon questions of identity, handwriting, temper, disposition, etc.]

Can we, then, lay down any general rule as to the nature of the opinions thus admissible, and the extent to which admissible?

We think there is no trouble in doing so.

But first, let us for a moment glance at the nature of the testimony, which, under such principles, is admitted in other cases.

Identity of persons or things. — The witness *recalls* the impression left on his mind, by his prior acquaintance with

Digitized by Google

or knowledge of a particular person or thing, and compares that impression with an impression produced in his mind at the time he testifies by the presence of a person or thing, sought to be identified with the person or thing which produced such prior impression.

Hand-writing. — Evidently a question of identity; and testimony in regard to it of like nature.

Intoxication. — The witness recalls and states the impression produced upon his mind by the appearance and conduct of the party, whose condition is the matter under examination, *at the time to which the inquiry as to his condition relates.* An act of *memory.*

Temper and *Affection.* — The witness recalls and states an impression as in the last case.

The rule we think has become self-apparent.

It is clearly indicated in the quotation we have made *supra* from the opinion of Campbell J., in *White v. Bailey*, and may be thus stated:

The opinions or impressions admissible are opinions formed or impressions made upon the mind of the witnesses (bearing, of course, upon the question of sanity or degree of capacity) *at the time*, by what they saw or observed.

Witnesses can not, at the time they are giving their testimony, be called upon, or permitted to reason or draw conclusions, in the form of opinions, from what they saw and observed at a prior time, and their present recollection of opinions then formed, or impressions made upon their minds, by what they so saw and observed.

To permit them to do so, would be to make them experts; the basis of their testimony, as experts, being not a hypothetical statement of facts, but certain facts, which, at a prior time, came under the witnesses' observation, and present recollection of opinions then formed or impressions made upon their minds by what they so saw and observed.

Digitized by Google

The question put to the witnesses calling for opinion must be, not *what is*, but, *what was*.

That this is so, may be demonstrated by a very simple test — to wit:

Suppose a witness, after having stated his acquaintance with the party whose sanity or capacity is in question, upon being asked, if he formed any opinion or received any impression from what he saw and observed, relative to such party's sanity or capacity, should answer in the negative; would it be competent to request him to consider and reflect upon what he had thus seen and observed relative to such party's sanity or capacity, and give the opinion which he should form thereon? Clearly not.

We submit, that the necessity which calls for the admission of opinions at all in inquiries of this character, is fully satisfied by its admission to the extent indicated, and to go beyond, would only lead to uncertainty and confusion.

If the rule we have sought to establish is the correct one, no argument is needed to show that neither of the questions involved in this point were admissible. It is self-apparent.

Neither of them called for any opinion formed or impression made upon the mind of the witness at the time of the interview concerning which he had testified; but each of them for an opinion, which he must necessarily form at the very moment.

But it will be said, that these questions were asked and were admissible for the purpose of obtaining the witness's opinion of the degree of capacity of Mr. Beaubien at the time he saw him, measured by some definite intelligible standard.

We reply; that if the witness formed an opinion as to any definite degree of capacity, possessed by Mr. Beaubien, it must have been by reference to some standard of

Digitized by Google

measurement then before him, to wit: some particular act which Mr. Beaubien was called upon to attempt or did attempt in his presence, requiring an exhibition of capacity; such for instance as the transaction of a particular matter of business. And the witness's opinion 'must be measured to the jury by that standard.

If he had at the time no standard of measurement in his mind, it is evident he could have formed no opinion as to any definite or measurable degree of capacity, and therefore could express none. If he was permitted to attempt to do so, it would not be an opinion, but a guess.

If the witness had testified that he at a particular time read and attempted to explain to Mr. Beaubien a written instrument, he might have described to the jury the nature of that instrument, and expressed his opinion or impression, whether he succeeded in making Mr. Beaubien understand it.

But he could not go further and express an opinion, that he had not mental capacity to understand some other instrument, which he never read, or heard read to him, or saw him make an attempt to understand.

S. T. Douglass for defendants in error:

In order to form an intelligent judgment as to the admissibility of the evidence of LeFevre, it is important in the outset to have a clear conception of the nature of the issues being tried.

The real and substantial question was, whether the paper propounded as the last will of Antoine Beaubien, (conceding it to have been executed with the proper formalities) expressed the purposes and intentions, or, in other words, the intelligent *will* of the testator as to the disposition which should be made of his property after his decease:— 3 *Eng. Ecc. R.* 109; 4 *Ibid.* 34, 49, 51; 1 *Bradf.* 360, 363; 2 *Bradf.* 42, 16, 261; 2 *Bradf.* 133;

Digitized by Google

2 *Bradf.* 244; 3 *Ecc. R.* 167-8, 172, 187, 204; 4 *Ecc. R.* 72; 6 *Ecc. R.* 417, 420; *Ibid.* 350, 354; 25 *N. Y.* 23-25 and cases there cited, 104.

Involved in this issue was the question:

1. Whether, when the will was executed, the testator was *capable* of making it, or, in other words, whether he had sufficient mind to be able to comprehend the nature and effect of the act he was performing, the relation which he held to the various individuals who might naturally be expected to become the objects of his bounty, so as to be capable of making a rational selection among them.

2. Whether, conceding that he possessed this moderate degree of intellect, the making of this will was an act of his own intelligent volition, or whether it was procured through undue influence exerted by others. *See cases above cited.*

How can the Court and jury be best enabled to determine such an issue by the aid of testimony — the only means of investigating truth in courts of justice?

Witnesses may be called to testify to such acts, conduct, demeanor and conversation of the deceased, as tend to show the degree of his capacity. This is undoubtedly the best and safest kind of evidence for the purpose, and should be availed of as far as it is practicable to do so. But we all know that it is available only to a limited extent.

It is hardly possible for any of us to observe the appearance, acts, conduct and conversation of another, even for a brief period, without forming some judgment as to the degree of his capacity.

This judgment, though it seems intuitive — because reached by mental processes, so rapid and unconscious — is really an inference from facts observed.

But the facts are so numerous, individually so unimportant, or have followed each other in such quick succession,

Digitized by Google

that, if called upon to state the grounds of our judgment, we should find it impossible to do so. The facts are, for the most part, from their nature, incapable of being analyzed and separately considered and described in language by the most subtle intellect. They will be only very partially retained by the most tenacious memory. A few salient circumstances, if any such happened to fall within our observation, we may be able to describe to another; but the description will not, in most cases, enable him to form more than an extremely incomplete and inadequate conception of the grounds of our conviction, or more than a very hazy and unsatisfactory opinion of his own. These salient facts, though capable of being narrated or described, may be less convincing and decisive in their nature, and have had less influence in producing the opinion we have formed, than other facts which are indescribable.

It is because of this peculiar and incommunicable nature of the facts and circumstances which indicate the degree of a man's mental capacity, that, on questions of capacity, courts have been compelled to allow witnesses, after having stated in full their opportunities for observation, and, so far as they can, the facts observed, to state their opinions as to capacity, founded upon what they observed.

This exception to the general rule, excluding the opinions of witnesses (though it has had a hard struggle for a foothold in this country) is now well established: — 1 *Greenl. Ev.* §§ 440, 216, 691; *Dewitt v. Barley*, 5 *Seld.* 371, 380; *same case*, 17 *N. Y.* 340, 348–9.

In England, in the ecclesiastical courts, the opinions of witnesses as to capacity, whether laymen or experts, have always been freely admitted. Such, also, has been the case in a majority of the States of the Union. Though in some of them only the subscribing witnesses to a will are allowed to give such evidence: — 1 *Greenl. Ev.* § 440.

In the ecclesiastical and other courts, where such evidence has been held admissible, the witness has generally

Digitized by Google

been allowed to testify to his opinion as to the capacity of the testator to *make a will*, or *to make the particular will in question.* It seems to have been very generally assumed that it was only by permitting this, that evidence of opinion could be made available. *See cases above cited.*

It is quite manifest, when attention is called to it, that such evidence involves an expression of the witness's opinion on matter of law as well as of fact — namely, the opinion of the witness as to the degree of capacity required to enable a person to make a valid will.

That evidence open to so grave an objection, should have been so generally received, or, indeed, that it should have been received at all, and that a distinction should have been made by some courts between the case of subscribing and other witnesses upon grounds so specious and unsubstantial as those assigned for it — 1 *Greenl. Ev.* §§ 440, 216, 691 — evinces in the strongest manner how deeply sensible courts have been of the necessity for admitting evidence of opinion on questions of capacity.

That the evidence of this kind very generally received was open to such an objection, we think, explains, in some degree, why some courts, feeling rather than distinctly apprehending the objection, and conceiving it to belong to the nature of such testimony, have gone so far as to reject evidence of opinion altogether: — *Dewitt v. Barley*, 5 *Seld.* 371, *and cases there cited by Mason J.*

Had the views expressed by the learned and very able judge (Selden), who delivered the opinion in *Dewitt v. Barley*, 17 *N. Y.*, 340, been conceived and enunciated at an early day, we apprehend that there would have been little conflict as to the admissibility of evidence of opinion in respect to capacity.

The case holds that the opinion of a witness, founded upon his own observation, whether as subscribing witness, expert or layman, as to the degree or extent of a testator's

Digitized by Google

capacity, is admissible; but excludes all such evidence as involves any expression of the witness's opinion upon any matter of law, as, for example, what degree of capacity is requisite in order to enable a person to make a valid will.

Under this decision, the authority of which we presume will not be controverted, you can not, as formerly was done, ask a witness, whether, in his opinion, the testator was capable of making *a* will, or of making *the* will in question; and yet you are clearly entitled to ask him any question, which, without calling for his opinion on any matter of law, will elicit his opinion as to what degree of capacity the testator had.

There is, unquestionably, considerable difficulty in accomplishing this, but the difficulty is inherent in the nature of the subject, and is not insurmountable.

We can conceive no way in which it can be done in a case like this, except by the witness stating, either in answer to interrogatories or otherwise, whether, in his opinion, the testator was capable of comprehending this or that particular thing — the contents of the will in question, or any thing else.

The evidence of the witness LeFevre is precisely of this character. There was involved in it no opinion on any matter in law. The only statement made by the witness, which can with any show of plausibility be claimed to involve any such opinion, was the remark that the testator "showed plainly that he had very little capacity to *transact* business," and this, if construed to involve any such opinion, was not called for by the question to which it purports to be in part the answer, and was not objected to by the contestants.

It will not be denied that the evidence tends to give that degree of precision to the witness's opinion of the testator's capacity, which, if opinion is received at all, and opinion involving matter of law is wholly excluded,

Digitized by Google

is necessary in order to shed any light on the issues in controversy.

The objection that opinion was only receivable as to whether the testator was capable of comprehending some particular thing which the witness, or some one else in his presence, endeavored to make him comprehend, assumes a limitation upon evidence of opinion not alluded to in the books; and if now made, and all evidence involving matter of law is excluded (as it should be), it would be far better at once to reject evidence of opinion altogether, for it will be so hedged about as to be of very little practical avail.

Take this case for illustration. The witness, LeFevre, visited Mr. Beaubien, not on business, but as his friend and spiritual adviser. He made no attempt to converse with him, except to inquire after his health, and give him some brief spiritual advice, for the *reason*, doubtless, that he perceived at once, on coming into his presence, that he was not capable of participating in or comprehending any other conversation. Beyond the fact that he was, considering his usual habit, and their former relations, remarkably taciturn, and that he appeared sometimes to make an effort to converse and could not, scarcely any clearly describable circumstance occurred which showed the degree of his capacity. And yet, from all he observed, he was enabled to form, and did form, an opinion on that subject. How would it have been possible, under the limitation proposed, to elicit that opinion?

CAMPBELL J.:

This case arises upon the will of Antoine Beaubien deceased, probate of which was refused in the Probate Court, and in the Circuit Court for Wayne county to which an appeal was brought. The will was opposed on the grounds of incapacity, and fraud and undue influence.

Digitized by Google

The proponents now bring error, alleging that the Court below received and rejected testimony improperly.

The will was sworn to have been executed at Detroit, on the 12th day of January, 1858. The testator had been married several years to the plaintiff in error, Julia Beaubien (now re-married to Thomas Coquillard), and had no children of his own. His wife had four children, one of whom, Rose, was married to Joseph A. Moross, who, with his wife, also joins in the writ of error. The will was drawn at Mt. Clemens, in Macomb county, by Robert P. Eldredge, who drew it from memoranda furnished by James B. Eldredge. Moross visited Mt. Clemens to get R. P. Eldredge to come to Detroit and draw it. He sent his son James, who was at that time a student at law. He testifies to having received instructions from Beaubien, through Mrs. Beaubien and Moross who interpeted between him and Beaubien, witness not understanding French, which was the language in which they conversed. R. P. Eldredge the next day drafted the will at Mt. Clemens from his son's memorandum, and gave it to Moross. This was on the day before the will is sworn to have been executed. He also gave Moross a memorandum, directing, among other things, that the attending physician of Mr. Beaubien should be present at the execution, and ask him if it was his will, and attest it as the principal subscribing witness. The persons present at the execution as witnesses were, Dr. Isaac S. Smith, Beaubien's physician (who lived at Grosse Point about nine miles from Detroit), Ignace Moross a brother of Joseph Moross, and Francis Provost.

Dr. Smith testified in his direct examination concerning the time and circumstances of the execution of the will, and that on that occasion a servant man came to his place after him, and said Mr. Beaubien wanted he should come down, and that witness arrived at the house from ten to eleven o'clock. Upon cross examination concerning

Digitized by Google

the time and circumstances of his going to Detroit, he stated; "A man, I suppose a servant, came for me the day of the execution of the will, and told me *that Mr. B. wanted me to come as soon as I could conveniently. He did not tell me to come in haste, and I did not hurry. Can't say whether the man came before breakfast; think I got to Mr. Beaubien's about eleven o'clock.*" The next day, his cross-examination continuing, he testified: "I think that when the man came to call me on the day that the will was executed, *he simply stated that Mr. Beaubien wanted to see me.*" He then states that the man must have come earlier than he before testified, and must have arrived at his house before breakfast, and by seven o'clock. Further on he testifies, "The man who came after me, at the time the will was executed, *said that Mr. Beaubien wanted I should come down and see him as quick as I could.*" He was then asked whether in his examination in the Probate Court he did not testify that the man who came for him *brought the message that Mr. Beaubien was very sick.* The question was objected to, but allowed under exception. Witness said it might have been so, and he might have said so. No ground for the objection to the question is given in the bill of exceptions, but it is alleged to be irrelevant, and hearsay. We think the testimony was not objectionable. Witness on his direct examination had undertaken to state what the messenger told him, and it seemed to have become important to ascertain the whole circumstances attending Dr. Smith's visit to Detroit; and whether it was hurried or deliberate. His own testimony had been somewhat inconsistent, and there would be no impropriety in suggesting to him — especially on cross-examination — whether he had not testified before upon the same point, in order to get at his best recollection. It can not be regarded as immaterial to ascertain all the details of a transaction which, if not a lawful and proper testamentary

Digitized by Google

transaction, must have involved an improper combination or conspiracy. If a will is not genuine, or is in any way improperly obtained, it is to be expected that no publicity will be given to the steps attending its preparation. In all cases, therefore, where a will is contested on any such ground, a very broad inquiry is permitted into the whole chain of circumstances attending its preparation; and the transaction must be deemed to embrace all the immediate preliminaries. It has always been held that inquiries concerning alleged frauds could not be limited by arbitrary rules, but that proof may be given of any matter at all tending to throw light upon the affair. It appears here that the instructions for executing the will contemplated that the physician should be sent for. The *res gestæ* necessarily embrace this as one of the steps actually taken. What message was sent, or received and acted upon, is therefore admissible as a circumstance, which may have weight or not, as made significant or not by other proofs.

Objection was also made to allowing Dr. Smith to be asked whether he did not testify on a former trial that he "said yes and no, and played good Lord and good devil, because he did not know into whose hands he might fall." We can see no ground for any objection to this question. It would go very directly to his fairness and candor, and is one of those questions commonly allowed to test the value of the witness as one likely to afford reliable evidence to the jury.

Witness on cross-examination had stated that, some years before, he had a conversation with Mr. Beaubien in his wife's presence. No part of the conversation was given, and it does not appear what it was about. Plaintiffs in error sought, upon re-examination, to ascertain what Mr. Beaubien said on that occasion. This the Court refused to permit, as the cross-examination had not covered it. This refusal was correct. It does not appear to have had any bearing whatever upon any part of the contro-

Digitized by Google

versy, and would have been opening an entirely new field of investigation.

The proponents asked to have Joseph A. Moross and Rose J. Moross discharged from the case, upon exhibiting a renunciation by Moross of the executorship, and a quit claim from Rose to her mother of all interest under the will; and also proposed to have said Moross sworn as a witness on such discharge. The Court refused to permit the change of parties to be made.

Whether parties who have taken an appeal from the court below, as proponents of a will, can be discharged in the appellate Court, is a question concerning which we have been referred to no satisfactory authorities. It has been held in some cases that an original probate court may discharge, in its discretion. But if the power exists, it can hardly be claimed as a matter of right.

The proponents of a will, when they appeal from the decree refusing probate, become actors responsible for costs, and shaping the issue to suit themselves. Should they all withdraw, the appeal must go down, according to the ordinary rules governing such matters. If all can not withdraw, and all should desire to do so and yet to leave the controversy pending, it might be difficult to settle such a dispute if the right existed. The utmost that can be claimed, as we think, is that a court may use its discretion to allow a claimant to withdraw upon such terms as shall not prejudice the rest. It is intimated in *Brush v. Holland*, 3 *Bradf.* 240, that an executor can not withdraw after he has so far acted as to offer the will for probate. The question, except so far as it regards this suit, is unimportant now, because parties are no longer excluded as witnesses. If there was any power in the Court to allow the application, it was discretionary, and the refusal is not to be reviewed on error. We do not feel called upon, therefore, without further argument, to determine under

Digitized by Google

what circumstances, if any, such parties may be allowed to withdraw from the controversy.

The witness, Peter P. LeFevre, having testified concerning the time when he made a visit to Beaubien before his death, counsel for contestants were allowed, under objection, to call his attention to his testimony on a former trial, in order to refresh his recollection; and this was done by referring to and reading counsel's minutes of the former testimony.

The authorities recognize this as not improper. The modes of recalling a witness's memory to facts which he has forgotten can not be arbitrarily restricted, and, if suspicious means should ever be used, the remedy is to be found in cross-examination and comment: — 1 *Stark. Ev.* 177. The precise course allowed here was permitted in *Laws v. Reed*, 2 *Lew. Cr. Ca.* 152. Mr. Greenleaf also refers to some other decisions involving the same principle: — 1 *Greenl. Ev.* § 436, *note* 3. The point was not strenuously urged upon the argument, and we think the Court below committed no error in allowing the question to be put, or in allowing the reference to the former testimony of the witness.

One Matthias Rouleau who had been a gardener in Beaubien's employment for several years, but left him some time before his death, was permitted to testify to a conversation held with Beaubien shortly before his death, in which the deceased expressed regret at having married, and stated that he was not master at home; that he was afraid of his wife, and was compelled to submit to her demands, or otherwise there would be trouble in the house. The issue presented for trial involved questions of capacity and of undue influence. It has been held generally that the declarations of a testator concerning his feelings in regard to different persons are the best evidence of his real sentiments, where they are made sincerely and unreservedly. His feelings towards his wife, and

Digitized by Google

towards the relatives of his own who would be affected by such a testamentary provision as is set up for allowance, must necessarily be inquired into in order to get at the true state of the case. It is said by the Court in *Waterman v. Whitney*, 11 *N. Y.* 157, that "the mental strength and condition of the testator is directly in issue in every case of alleged undue influence; and the same evidence is admissible in every such case, as in cases where insanity or absolute incompetency is alleged. It is abundantly settled that upon either of these questions the declarations of the testator, made at or before the time of the execution of the will, are competent evidence." The question in that case was whether the same rule would permit the proof of subsequent declarations, and it was held it would. See also *Rambler v. Tryon*, 7 *S. & R.* 90; *Lightner v. Wike*, 4 *S. & R.* 203. We can perceive no ground upon which this testimony can be properly excluded.

Dr. Smith, who had testified in his direct examination to the valid execution of the will, and the capacity of the testator, was asked whether he had not, on a certain occasion, at Mr. Beaufait's house, had a conversation with George Moran and one Page, referring to Beaubien's death and will, and declaring that if the family should follow it up they would break the will, for it was not worth a snap of his fingers. This he denied. Moran was called upon the stand and asked whether, on that occasion, Smith made the remark mentioned concerning the will. The question being objected to was discussed, and withdrawn to introduce some preliminary inquiries which were objected to, and which related to the preliminary conversation touching Beaubien's death, and whether Moran had any conversation with Smith that night about the will, Smith having denied any conversation with him on any subject. The grounds of the objection were not given, but it is now claimed that the conversation, if had, was immaterial. We think the contradiction comes prop-

Digitized by Google

erly within the rule of impeachment. When a witness testifies on the stand that a paper was duly executed by a competent testator, his statement on another occasion that the instrument was worthless, is a clear contradiction on the very essence of the issue. The case of *Patchin v. Astor Mutual Ins. Co.*, 3 *Kern.* 268, where the same objection was made that is made here, that the statement was one of opinion and not of fact, is directly in point. It was in the witness's power, if he saw fit, admitting the conversation, to explain that it was a mere matter of opinion, and based upon the facts sworn to on the trial. Such a statement, however, upon so plain a matter, is usually one which would be understood as intended to cover facts; and even if confined to opinion, it would, upon a question of capacity, and coming from the attending physician and subscribing witness, be as directly material to the issue, because the witness's opinion formed one of the most important parts of his testimony. It is difficult to conceive how a subscribing witness could declare a will worthless, and yet not intend to convey a statement of fact inconsistent with testimony which should show it to have been made by a man of sound mind, and acting without pressure. The preliminary questions were necessary in order to identify time and place, and the fact of a conversation. The subsequent rejection of testimony which should have been received can not affect the admissibility of this. The testimony of Trombley, to which similar objections were raised concerning preliminary questions, is express as to specific facts concerning the execution of the will, related to him by Smith, and not excluded or objected to. The preliminary inquiries were pertinent and proper.

The testimony showing Mrs. Beaubien's abuse of the Beaubien family, when she ascertained the contents of a former will making provision for them, and her quarrel with her husband about it, was properly received. In all cases of this character it has been customary, as the reports

Digitized by Google

show, to allow a wide range of inquiry into the family relations, and the terms upon which they have lived. It would be impossible to obtain a clear idea concerning motives and probabilities without it. These cases, as before intimated, are determined generally upon circumstantial evidence; and it must be received upon all points tending to throw light upon the various family relations. The same remark will apply to the negative evidence that no complaint was made by Beaubien of any importunity from his natural heirs. Although of no great force alone, it had a tendency, if true, to show that her charges made to him about their rapacity did not meet with any response in his feelings, and also that he had not been driven to disinherit them by any such importunities of theirs. It was not irrelevant, and was admissible as throwing some light, however faint, upon these domestic affairs. The former wills, and other pecuniary arrangements for Mrs. Beaubien connected with them, were properly received in evidence. It is true, of course, that making one will does not, of itself, render it at all unlikely that another will may be substituted; but previous preferences and plans may have a plain bearing upon an issue, where the question arises whether the testator has understandingly, and of his own free will, changed his settled views. No case has been cited holding such proof inadmissible. It is of very frequent occurrence in the cases reported: — *Hughes v. Hughes*, 31 *Ala.* 519; 8 *S. & R.* 573; *Love v. Johnston*, 12 *Ired.* 355; *Dodge v. Meech*, 1 *Hagg.* 612; *Marsh v. Tyrrell*, 2 *Hagg.* 84; *Mynn v. Robinson*, 2 *Hagg.* 169; 1 *Jarm. on Wills*, 81 – 2 *and notes* (*Perkins, Ed.*)

The principal question argued upon the hearing related to the kind of evidence admissible to prove the extent of the testator's capacity, and the witnesses competent to give their opinions on the subject. We have had occasion in *White v. Bailey*, 10 *Mich.* 155, and *Evans v. People*, 12 *Mich.* 27, to refer to some features of this inquiry, but the

Digitized by Google

fullness of the argument in the present case, and the necessity of removing any doubts which may exist among practitioners in this State, render it proper for us to express our views more fully than was necessary in those cases. The case now before us furnishes a good example of its kind, inasmuch as it involves the investigation, not only of the actual extent of Mr. Beaubien's capacity to make a will if let alone, but also that of making a will unaffected by such influences as are alleged to have been at work to guide his action. The abstract question, how much capacity a man must have to make a will, is not very important, because, with but one or two exceptions, the authorities are entirely agreed upon all that it is necessary for us to consider. It can not be claimed that a will is valid, unless the testator not only intends of his own free will to make such a disposition, but is capable of knowing what he is doing, of understanding to whom he gives his property, and in what proportions, and whom he is depriving of it as heirs or devisees under the will he revokes: — *Harrison v. Rowan*, 3 *Wash. C. C.* 580; *Burger v. Hill*, 1 *Bradf.* 360; *Wier v. Fitzgerald*, 2 *Bradf.* 42; *Kinne v. Kinne*, 9 *Conn.* 102; *Sutton v. Sutton*, 5 *Harr.* 459; *Horne v. Horne*, 9 *Ired.* 99; *Converse v. Converse*, 21 *Vt.* 168. Whether he can be required to possess any further qualifications, we do not now propose to consider.

It was necessary, therefore, in the present case, for the jury to be made acquainted, as nearly as possible, with the precise condition of the testator, in order that they might judge of it as they would have done had they personally known all about it. In all testimony the object of the law is to enable the jury to know all that the witness knows, which is pertinent to the issue; and every rule of evidence is designed to secure this end. It is expected of jurors that they have the same powers of judgment possessed by ordinary men, but not the special knowledge belonging to certain occupations or studies. And

Digitized by Google

the first question which arises is, whether there in anything in the nature of inquiries concerning mental capacity, which requires juries to be informed, of necessity, by other than ordinary witnesses.

The law has always required mental capacity to render persons responsible for contracts, or crimes, as well as able to make wills, although not applying precisely the same rules to the three subjects. In criminal cases, the jury, from time immemorial, have been obliged to pass upon the capacity of the accused. In civil cases, persons dealing with their neighbors have been held bound, generally, to form their conclusions of capacity at their peril, where they have had means of observation: — *Beavan v. McDonell*, 26 *E. L. & Eq.* 540. It is only in modern times that medical science has been brought to bear upon these matters. Except in obscure cases of disease, or those peculiar cases where the conduct and appearance of the alleged unsound person present nothing unreasonable or unusual, we have the same means — whether perfect or imperfect — which have always been had, of forming an opinion without medical aid, and no better.

The general stock of knowledge among unscientific men is now, as always, derived from common observation and experience, and, whether adequate or inadequate for all purposes, it certainly serves for most. This is especially true in regard to cases of natural decay from age or weakness. The appearances and effects of this decline are familiar to all mankind. And, while it is well that new means of information may be attainable, the law does not generally exclude any class of men from being witnesses because there may be found wiser men, or more accute and sagacious observers.

Lord *Hale* remarks that "physic and salves were before licensed physicians and chirurgeons" (1 *Hale, P. C.* 429); and it is equally true that men were acquainted with the ordinary manifestations of mental weakness and unsoundness,

Digitized by Google

before they were included in the domain of science. By considering the manner in which questions of mental condition have been treated and investigated in the various courts, we may be enabled to understand what course has been the result of long experience.

The most common controversies, involving questions of mental condition, arose in criminal trials and prosecutions. And it is perhaps significant that questions of evidence on this subject have rarely been reported until very recently even in these. Had the tests of mental soundness been technical, and the inquiries to the witnesses been governed by peculiar rules, it can not be doubted that the books would have preserved some trace of the practice. But enough appears incidentally, to furnish sufficient light for our guidance. By the rules of the criminal law a person could not be held liable for criminal acts committed during mental unsoundness, nor could any step whatever be taken against him during the incapacity, whether it existed at the time of the offense, or was brought on afterwards. We have accordingly inquiries made, not only upon trial, but also upon arraignment and after conviction, as well as the special inquisition made for purposes of guardianship.

In the latter the condition of the person was to be determined by personal inspection, as well as by the testimony of witnesses; while, upon appeal to the King in council, the personal examination appears to have been chiefly relied on:—*Fitzh. Nat. Br.* 232, 233; 1 *Hale, P. C.* 33. And personal examination and inspection has always been deemed of the utmost importance. A private examination by the chancellor has been of very frequent occurrence, and has often been entirely satisfactory. In all of these proceedings, while testimony is generally necessary, and in many cases scientific testimony is of the utmost value, yet the law has always regarded the subject as

Digitized by Google

usually open to the common understanding, and capable of being judged by personal intercourse.

In *ex parte Smith*, 1 *Swanst.* 7, it is said that where the lunatic is unfit to appear before the jury, and they can not all go to him, one or two go and examine, and report to the rest his state and condition. And in the *Matter of Russel*, 1 *Barb. Ch.* 38, the importance of having the jury see the alleged lunatic is declared in very strong terms, the chancellor expressing a determination to require his production on pain of punishment to those neglecting it. Accordingly Lord Hale says, "if a lunatic be indicted of a capital crime, and this appears to the Court, *the witnesses to prove the fact may and must also be examined, whether the prisoner were under actual lunacy at the time the offense was committed.*" And the question whether a person was *non compos mentis*, so as to excuse him from trial, or from punishment on conviction, is recognized as in the determination of the Judge, although Hale recommends an inquest in all doubtful cases; and this is now the general practice in England:—1 *Hale, P. C.* 35. According to him the Judge may even stop the trial, and discharge the petit jury, on discovering insanity; but the more common practice has been to direct an acquittal. In the case of *Regina v. Goode*, 7 *A. & E.* 536, where a prisoner was brought for arraignment into the Queen's Bench before all the Judges, and it was proposed to call a medical man before the jury of inquest to testify concerning his present state of mind, the Court said it was unnecessary, and the jury were instructed to decide from what had taken place in their presence, and found him insane. In the celebrated case of *Regina v. Oxford*, 9 *C. & P.* 525, where the prisoner was indicted for a treasonable attempt to murder the Queen, his insanity was proved by his relatives and other unprofessional witnesses. The report says, "The most material evidence as to the prisoner was given by an inspector of police, named Ted-

Digitized by Google

man, who saw him frequently for about eighteen months, during which he was barman." The opinion of this witness appears to have been given after showing the extent of his acquaintance, and without undertaking to describe the appearances on which he formed it; for afterwards, upon "being asked upon what fact he founded his opinion that the prisoner was of unsound mind," he proceeded to give some details of his conduct. Several eminent medical men were also examined, and in reference to their testimony the Court, through Lord *Denman*, *Ch. J.*, observed, "It may be that medical men may be more in the habit of observing cases of this kind than other persons; and there may be cases in which medical testimony may be essential; but I can not agree with the notion that moral insanity can be better judged of by medical men than by others." Baron *Alderson*, and Mr. Justice *Patterson* were associated with Lord *Denman* on this trial. The inquiries concerning the capacity and understanding of the deaf and dumb are included by the authorities within the same rule which governs as to capacity generally; and in these cases medical testimony does not appear to have been deemed important: — *Rex v. Pritchard*, 7 *C. & P.* 303; *Rex v. Dyson*, 7 *C. & P.* 305; *Rex v. Thomas Jones*, 1 *Leach C. C.* 120. No English case has been found by us, which, in criminal procedure, has required scientific evidence, to the exclusion of the testimony of ordinary witnesses acquainted with the accused. In the case of *Freeman v. The People*, 4 *Denio*, 9, where there was much controversy concerning the field which might be covered by the opinions of medical men, the opinions of ordinary witnesses, of the sanity of the defendant, were received on behalf of the prosecution without any exception from the defendant. And the question does not seem to have excited any serious discussion in criminal cases. The same evidence which is proper in one common law tribunal before a

Digitized by Google

jury, can not be improper in another. The form of the questions is a distinct consideration, concerning which we may also derive light from the practice in criminal cases; and to this reference will be made presently.

The next class of cases requiring attention embraces those raising the question of testamentary capacity directly. That the English ecclesiastical courts allow witnesses of all kinds to testify to their opinions, concerning persons whom they have seen and known, is not to be questioned. And the fact that these investigations are much more frequent there than elsewhere, is a reason why the results of their experience should be deemed of no small value. But, inasmuch as some authorities referred to on the argument seem to intimate that those courts have introduced new and unsound rules of evidence, it may be proper to examine into the decisions and practice of other tribunals. But, at the same time, it must be remembered that we are now considering a case which was appealed from a probate court, whose practice is largely borrowed from that of the English ecclesiastical courts; and it is not easy to perceive why testimony allowable in the lower court should be shut out on the hearing above.

It has never been disputed that the subscribing witnesses may testify concerning the actual mental condition of the testator, as freely as medical witnesses who speak from personal acquaintance and investigation. The reasons given, by those courts which confine such testimony to these witnesses, are based upon the assumption that they are called in for the special purpose of scrutinizing the capacity, as well as the acts of the testator. It is matter of every day experience that wills made *in extremis* must usually be witnessed by any persons who are conveniently to be found; and it is not often that much care is taken to procure educated or peculiarly intelligent witnesses; nor is their attention in fact very closely addressed to the question of capacity, beyond what

Digitized by Google

would naturally be the case with any other observers present. But, be this as it may, the rule assumes that any person of ordinary capacity may form a reliable opinion concerning the condition of another, from simply witnessing the execution of a will, which is rarely drawn up or discussed in the presence of the attesting witnesses. It is little short of absurdity to hold that persons having equal or greater facilities, derived from personal acquaintance and long intercourse, are not as competent to form opinions as those who are required to have no opportunity beyond one brief interview. The rule is also fallacious, in ignoring the fact that, in most cases of alleged fraud or imbecility, the procurement of a will involves a suspicion of mal-practice, and that those relying upon a will improperly obtained would have a most dangerous advantage given them, by affording their subscribing witnesses a degree of credit which, in many instances, would render any attack upon their statements useless.

Referring, as before, to the English practice outside of the ecclesiastical courts, we find the commonest examples of the investigation of mental capacity in suits in chancery, brought to establish or set aside wills and devises. In these cases it is quite common to have the testimony perpetuated; and, whenever there is any serious controversy, an issue of *devisavit vel non* is sent down for trial. The rule in chancery requiring the examination of all the subscribing witnesses is thus explained by Lord Camden: "Sanity is the great fact the witness is to speak to when he comes to prove the attestation; and that is the true reason why a will can never be proved as an exhibit *viva voce* in chancery, though a deed may; for there must be liberty to cross-examine to this fact of sanity. From the same consideration it is become the invariable practice of that Court never to establish a will unless all the witnesses are examined; because the heir has a right to proof of sanity from every one of them whom the

Digitized by Google

statute has placed about his ancestor": — *Gresley's Eq. Ev.* 123. And if no examination has been had as to sanity, the cause will be adjourned to have it taken: — *Ibid.* The form of interrogatory calls directly for the conclusion of the witness, and is as follows: "Was the said testator, at the time of the execution of the said produced will or writing, of sound memory and understanding, or not, as you know, or for any and what reason or reasons believe": — *Gresley's Eq. Ev. Appx.* The form given in the Equity Draftsman is whether the testator was "of sound and disposing mind, memory and understanding, or how otherwise, as you for any and what reasons know or believe." In the case of *Tatham v. Wright*, 2 *Russ & M.* 1, where upwards of sixty witnesses were examined in the court of chancery, and upon the trial of the issue in the court of law, some quotations are given, showing what answers the witnesses were permitted to give, with the approval of the court. One of the attesting witnesses, after speaking of the weakness of John Marsden's, the testator's, faculties, said: "*That he was capable of making a plain straightforward will or codicil, to a limited extent.*" On his cross-examination he gave his opinion as to the incapacity of Marsden to transact business, manage property, &c., very fully, and also that he "had not the power to follow his own inclinations, or to act as he wished without the restraint or control of the defendant Wright in matters of consequence, and that he had not a will of his own in such matters; *that he did not think John Marsden was capable of giving written instructions or directions for his will to Giles Bleasdale, or to any other person; and that, in his opinion, John Marsden was not capable of comprehending, combining together, and judging accurately of the nature and consequences of any legal instrument creating a variety of new rights and interests.*" Another witness said Marsden was of sufficiently sound and disposing mind, memory and understanding, to make a *plain*

Digitized by Google

and simple will or codicil, though not to make an intricate or complicated will or codicil." His cross-examination corresponds almost exactly with that quoted from the other witness. Another phrase quoted by *Tindal Ch. J.* from one of the defendant's witnesses — not a subscribing witness — is "he was utterly incapable of managing and conducting his own affairs, *and of giving instructions for such a will as that in question*, even divested of its technicalities." The Master of the Rolls, the Lord Chancellor *Brougham*, the chief Baron of the Exchequer Lord *Lyndhurst*, and chief justice *Tindal*, all received and acted upon this testimony, but sustained the will upon the whole case. The heir (who was held not bound by the decree) then brought ejectment, and the questions raised upon the various trials were carried through all the courts, and finally settled in the House of Lords: — *Wright v. Doe d. Tatham*, 1 *A. & E.* 3; 7 *A. & E.* 313; 4 *Bing. N. C.* 489. It will be perceived by referring to these reports, that the testimony concerning the capacity of the testator was introduced in the same way as in the chancery cause, and the witnesses gave the same kind of opinions. The controversy was thoroughly and sharply contested, but no question whatever was raised, in any of the courts, concerning the propriety of asking or receiving these opinions. The case finally went up on the admissibility of certain letters found opened among the testator's receptacles, addressed to him but having no memoranda made by him, and not proved to have been answered or acted on. Letters answered seem to have been received in evidence. These unanswered letters were offered to show how he was treated by his friends; it being claimed that they were in the nature of *res gestae*, and such as would not have been written to a man lacking ordinary capacity.

Lord *Denman*, and *Coleridge* and *Littledale JJ.* concurred in rejecting them, admitting, however, that the

Digitized by Google

slightest act of the testator connecting him with them would have made them admissible. *Patteson* and *Williams JJ.* had been of counsel, and gave no opinion. In the Exchequer Chamber, and in the House of Lords, some of the judges thought them admissible as *acts*. A majority regarded them as merely equivalent to the statement of opinions which should be rejected, *because not made under oath, nor under the test of cross-examination.* The practice of receiving the opinions of witnesses upon capacity is fully recognized, and such evidence is stated by *Alderson* B. to be not properly mere opinion, but a compendious way of reaching the fact of capacity which can not otherwise be explained. And to the same purport is the remark of *Parke* B. (who concurred with *Alderson* B. and the majority in rejecting the letters), who says: "The question is not what the capacity of the testator was reputed to be, but what it really was in point of fact; and though the opinion of a witness under oath, as to that fact, might be asked, *it would only be a compendious mode of ascertaining the result of the actual observation of the witness, from acts done, as to the habits and demeanor of the deceased.*" In this case some of the Judges say that if the ecclesiastical courts admitted evidence of the manner in which a person was treated by others, independent of his own acts under that treatment, they disapproved the practice; but it is not intimated by any one that, in regard to the question in controversy before us, there was any difference in the practice of any of the courts. We do not feel called upon to express any opinion upon the point decided in that suit.

So far as the form of the question is concerned, it has been customary in all the courts to allow it in such a way as to test the capacity with reference, as near as may be, to the very act or kind of act in dispute. In *Rex v. Pritchard*, and *Rex v. Dyson*, before cited, this appears very clearly, as it does also in the cases above

Digitized by Google

referred to. See also *Eggleston v. Kingston*, 8 *Ves.* 439. In several of the criminal decisions the proper form of a question to be put to the medical witnesses has been discussed, and it was finally referred by the House of Lords to the Judges, whether a form commonly used did not interfere with the prerogatives of the jury. That form was, whether, *from the testimony of the other witnesses*, the act of the prisoner was an act of insanity. In *Rex v. Wright*, *Russ. and Ry.* 456, this question was allowed, and it is said several of the Judges doubted its propriety. The witness was allowed to discuss the whole case upon the evidence of the rest. In *Rex v. Offord*, 5 *C. & P.* 168, which was tried subsequently, the evidence was received in that form. The case of *Rex v. Wright* was referred to in a note, but it does not appear whether the attention of the Court was called to it. In *Regina v. Pate*, 5 *Warren's Works*, 309, a physician who said that *from all he had heard that day*, and from personal observation, he was satisfied the prisoner was of unsound mind, was rebuked by *Alderson*, *B.* for assuming the functions of the Court and jury. In *McNaughton's case* the physicians were allowed to give their conclusions from the evidence, one of them summing up the entire case by saying that the prisoner was insane, and committed the offense while afflicted by a delusion, under which he appeared to have been laboring for a considerable length of time. The result of McNaughton's acquittal was an inquiry by the House of Lords into the general subject of insanity, and, among other things, whether a medical witness, who never saw the prisoner, but was present at the trial and heard the testimony, could be asked his opinion of the state of the prisoner's mind at the commission of the offense, or whether he was conscious of acting illegally, or laboring under any delusion. The Judges all agreed that the question was open to the objection that it allowed the witness to form his own conclusions

Digitized by Google

from the testimony of others, whereas their credibility should be determined by the jury. But otherwise the question was not deemed objectionable, and they stated it would be proper where there was no dispute or difference among the witnesses. *Maule J.* considered the question admissible according to the settled practice, although theoretically open to the objection named. *Opinions of Judges, note to Regina v. Higginson*, 1 *C. & K.* 129. In *Bainbridge v. Bainbridge*, *Taylor's Med. Juris.* 908, such a question was ruled out, on the ground suggested, while in the later case of *Duke of Manchester v. Bennet*, *Taylor's Med. Juris.* 901, 908, it was held competent.

From the best examination which it has been possible for us to make of the English practice, we are satisfied that in all of the courts, civil and criminal, as well as in the ecclesiastical courts, the practice concerning proof of mental condition is the same, and permits all who have had means of observation to testify concerning the existence and measure of capacity with reference to the matter in controversy; while it does not permit those who do not testify from personal observation to give a direct opinion of capacity, except upon some given hypothesis. In every case the witnesses who speak from their own observation are expected to describe, as well as they can, what has led to their conclusions, as well as their means of observation. But the cases referred to show that, in many instances, the results of very limited observation have been permitted; — the safeguard of cross-examination and a comparison of testimony being deemed sufficient to prevent any mischief from the inperfect knowledge of single witnesses.

In the United States, the authorities all require the witness to state such facts as he can, in order that the jury may be better enabled to determine the value of his opinions; — stress being of course laid upon his opportunities of judging. In many cases the facts which can be

Digitized by Google

described will be very significant to a jury, while there are many facts susceptible of a different interpretation, from which a jury could obtain no light whatever without the aid of the witness's judgment. The strongest indications of mental weakness or aberration often exist in expressions and appearances incapable of reproduction, even by an accomplished mimic; and yet decisive to any intelligent eye-witness. The great body of decisions in the United States adopt the English practice, and open the door to all testimony which can enlighten the jury, from every kind of witnesses. And in regard to the kind of weakness alleged to have existed in the case of Mr. Beaubien, there has been a very general feeling that very little aid can be had from strictly scientific witnesses, beyond that furnished by ordinary experience. The mere fact that a person is a physician does not of necessity qualify him to speak *ex cathedra* on this subject — especially when every one can assume the title with impunity. Men of real knowledge can always gain a respectful hearing on their own merits. The fact that in all important litigations the experts are found arrayed against each other, renders it necessary for the jury to determine which is right, and in doing this they must fall back upon their own knowledge of human nature. Judge *Redfield* has referred to this difficulty in the chapter on Senile Dementia: — *Am. Law Reg. for June*, 1864, *pp.* 458, 459. See also *Taylor's Med. Juris.* 890, 891, 907, and *Delafield v. Parish*, 25 *N. Y.* 9. And where the witnesses speak from their own observation, the questions which may be put to one, may be also properly put to another.

The authorities in this country have passed directly upon points which in England have been settled by unbroken practice; and we find, therefore, that here the admissibility of non-professional testimony has been discussed very fully. The general doctrine is, that all witnesses speaking from observation must, as far as possible, state

Digitized by Google

such facts as they can give as the basis of their opinion. This rule does not require them to describe what is not susceptible of description, nor to narrate facts enough to enable a jury to form an opinion from those alone. This would be impossible; and if it could be done, there would be no occasion for any opinion from the witnesses. It is a matter of daily experience that the opinion of an intelligent and familiar eye-witness is the only satisfactory means of ascertaining mental condition, or disposition, or expression, or any other of those impalpable but important facts upon which men rest in dealing with each other. There is no substitute for personal observation. But, if witnesses were not compellable to state such facts as are tangible, there would be no means of testing their truthfulness. When they state visible and intelligible appearances and acts, others who had the same means of observation may contradict them, or show significant and explanatory facts in addition; and if their story is fabricated, or if they describe facts having a medical explanation, medical experts may detect falsehood in inconsistent symptoms, or determine how far the symptoms truly given have a scientific bearing. But, from the nature of things, no rule can be laid down declaring what amount of acquaintance or what opportunities are necessary to enable an observer to be a witness. There are cases of insanity open to the slightest scrutiny, while others defy the keenest search. But no testimony can be of any real value, unless it appears the witness had adequate means and opportunities for forming some conclusion.

The cases of *Clary v. Clary*, 2 *Ired.* 78; *Clark v. State*, 12 *Ohio*, 483; *Potts v. House*, 6 *Geo.* 324; *Dunham's Appeal*, 27 *Conn.* 192; *Norris v. State*, 16 *Ala.* 776, and *Powell v. State*, 25 *Ala.* 21, are so full and satisfactory in their reasoning upon the admissibility of opinions from all witnesses speaking from personal knowledge, that nothing can be added to enforce them. To the same effect

Digitized by Google

are *Roberts v. Trawick*, 13 *Ala.* 68; *Watson v. Anderson*, 13 *Ala.* 202; *Florey v. Florey*, 24 *Ala.* 241; *Wilkinson v. Moseley*, 30 *Ala.* 562; *Hughes v. Hughes*, 31 *Ala.* 519; *Doe v. Reagan*, 5 *Blackf.* 217; *Rogers v. Walker*, 6 *Barr*, 371; *Kinne v. Kinne*, 9 *Conn.* 102; *Grant v. Thompson*, 4 *Conn.* 203; *Dicken v. Johnson*, 7 *Geo.* 484; *Townshend v. Townshend*, 7 *Gill*, 10; *Dorsey v. Warfield*, 7 *Md.* 65; *Baldwin v. State*, 12 *Mo.* 223; *Lester v. Pittsford*, 7 *Vt.* 158; *Dewitt v. Barley*, 17 *N. Y.* 340. Many other cases might be added were it desirable to multiply citations.

The only remaining question is, in what form it is allowable to introduce evidence of capacity. It was objected on the hearing that a direct answer that a person is insane, or incapable of doing one thing or another, is not receivable because usurping the office of the jury. The only authority relied upon is a statement in Judge Selden's opinion in *Dewitt v. Barley*, 17 *N. Y.* 340, that the decision of the same court in the same cause, in 9 N. Y. 371, was only binding upon that question, and not upon the general doctrine of the inadmissibility of opinions for any purpose. But while Judge Selden relies upon this distinction to avoid a conflict with a reported case, he distinctly approves of the dissenting opinion of Judge Denio, which demonstrates the propriety of just such inquiries; and the whole of his reasoning is aimed at overthrowing the position of the majority opinion on the former hearing. The opinion of Judge Denio, in 9 N. Y., refers to numerous cases in which the inquiry was made and answered distinctly. And in *Delafield v. Parish*, Judge Selden quotes, as quite conclusive, the answers of some witnesses coming directly within the supposed objection. Mr. Lord says, in regard to the testator's condition at the date of the second codicil, "*I had no doubt, and have not any, of his entire capacity to understand what he was doing, and the effect of it.*" The same witness speaks as to the testator's capacity to make the third codicil, "*In my judgment it*

Digitized by Google

was perfect for the purpose of making a codicil of this kind; he fully understood it, and fully agreed to it." And Dr. Taylor testified, "*I had not myself the least doubt of the soundness of his mind, nor could I have supposed that any intelligent person could doubt its soundness.*" p. 106. This is the testimony upon which Judge Selden chiefly relied, and no suggestion is made by him, or any one else, that it was not admissible. The objection to a witness assuming the functions of a jury did not escape the notice of the court, a majority of whom held that a "medical witness can not be asked his general opinion (*i. e. his conclusion from all the evidence*), as to the state of the party's mind at the time of doing the act:" p. 75. A majority of the court concurred in so much of Judge Gould's opinion as commented on the attempt to introduce the opinions of medical men violating this rule. But no one held any of the opinions of the witnesses who spoke from their own observation to be incompetent, although there was a great deal of such testimony. They simply say of them that their value depends on how far they are sustained by facts: p. 38, 39. It can not be said, after the decision in *Delafield v. Parish*, that such opinions are regarded by the Court of Appeals as infringing upon the province of the jury. Nor have we discovered any ruling elsewhere excluding opinions in that form, where they are received at all. Counsel for plaintiffs in error admitted on the hearing that the general practice was to receive them, and referred to several authorities to that effect. They might be multiplied almost indefinitely. Thus, in *Hughes v. Hughes*, 31 *Ala.* 519, the testimony was that "the testator was of sound and disposing mind and understanding." In *Culver v. Haslam*, 7 *Barb.* 314, "not capable of transacting business understandingly." In *Wier v. Fitzgerald*, 2 *Bradf.* 42, the question went to the capacity to make a will. In *Mowry v. Silber*, 2 *Bradf.* 133, capacity to transact ordinary business. In Massachusetts, such witnesses

Digitized by Google

as may give opinions, give them in the same way:—*Poole v. Richardson*, 3 *Mass.* 330; *Buckminster v. Perry*, 4 *Mass* 593; *Hathorn v. King*, 8 *Mass.* 371; *Dickinson v. Barber*, 9 *Mass.* 225; *Needham v. Ide*, 5 *Pick.* 510; *Commonwealth v. Rogers*, 7 *Met.* 500. In this latter case *Shaw Ch. J.* explains the whole doctrine very clearly, and distinguishes between an opinion which the jury can estimate by the truthfulness and intelligence of the witness, and one which is based upon the witness's judgment of other testimony, which he might believe and the jury might disbelieve. He says there is no legal objection because the opinion covers the substantial facts of the case—a thing which is done by direct testimony of facts in a majority of simple cases. To the same effect is *Lunning v. The State*, 1 *Chandler*, 178, 264. In *Cook v. Castner*, 9 *Cush.* 266, this subject is further elucidated by Chief Justice Shaw. That case involved an inquiry into the condition of a vessel's timbers at a prior date, and whether decay was ascertainable on inspection; and an expert was allowed to be asked whether, from his knowledge of the vessel, it would have been possible fifteen months before to take off a piece of the thick streak and replace it with new without discovering the rot; such replacing having occurred. In *Cottrill v. Myrick*, 3 *Fairf.* 222, where a stream had been improved, a witness was allowed to testify from his knowledge of the habits of certain fish, whether they could have ascended the river in its natural state. In *Willis v. Quimby*, 11 *Fost.* 485, a witness, not an expert, was permitted to state that a horse could not have been sound at a certain time, because soon after a disease appeared in his feet manifestly of long standing. In *Malton v. Nesbit*, 1 *C. & P.* 70, it was held that a nautical expert might testify that a given state of facts would be negligence, while in *Sills v. Brown*, 9 *C. & P.* 601, it was held such a witness could not be asked whether, *from the evidence he had heard*, there was such negligence. And

Digitized by Google

in *Fenwick v. Bell*, 1 *C. & K.* 312, it was held that a nautical witness might be asked whether, "having heard the evidence, *and admitting the facts as proved by the plaintiff to be true*, he was of opinion that a collision between the two ships could have been avoided by proper care on the part of the defendant's servants." These three cases illustrate very forcibly the true distinction as explained in the answers of the Judges to the House of Lords before referred to.

We think that there can be no impropriety in allowing the opinions of the witnesses upon any measure of capacity which is calculated to aid the jury in coming to a conclusion. What we loosely term opinions and impressions are declared by many of the authorities to be no more nor less than statements of fact, differing from ordinary statements only because of peculiarity of the subject. When a witness is asked what is the size or color of a certain object, or whether the evening is light or dark, clear or cloudy, the only difference between the impressions from which he speaks and those relied on in cases of capacity, is that they are less open to difference of opinion among observers. Evidence concerning personal identity must always be matter of opinion, but it is always received in a positive form. So may be evidence of value, of hand writing and the like, which are purely matters of opinion. Whenever the facts are such that the jury can not form an unaided opinion, it is essential that the opinions which they receive should enlighten them upon the exact point in controversy, if possible, for otherwise their verdict will be conjectural. The course of decision upon this subject is so complete and uniform that we must accept is as the practice found safest by experience. Juries are not bound to accept opinions unless they consider them well founded, and we do not find in practice that they are often misled by the opinions of eye witnesses who approve themselves sensible and candid.

Digitized by Google

The questions objected to in the case before us come very far within the rule laid down. Capacity to understand an ordinary document, or to hold a continuous conversation, may certainly be inquired into as furnishing a means of informing the jury, as near as may be, of the extent of the testator's powers, physical and mental combined, as affecting his capacity to make the will propounded. Unless such inquiries can be made, it is hard to conceive to what point questions could be directed, so as to give the jury any light whatever on the case. To exclude them would inevitably lead to compelling jurors to form their decision upon such descriptions of acts and appearances as the witnesses could give—and entirely shut out the opinions of any witnesses based on their own observation.

We think there is no error in the rulings.

MARTIN CH. J. and CHRISTIANCY J. concurred.

MANNING J. did not sit in this case.

Judgment affirmed.

The People on the relation of John J. Speed v. Thomas H. Hartwell.

Quo warranto: office terminated since information filed. — An information to try the right to a public office will not be dismissed on the ground that the office has expired since information filed. To oust the incumbent is not the sole object of the proceeding, but, under the statute, if he is found guilty of the intrusion, a fine may be imposed, and costs recovered; and if the relator claims the office, and is found entitled to it, he may recover damages.

Election required by law to be held: neglect to give notice. — Where a city charter requires a vacancy in a city office to be filled at the next annual election, and directs the city clerk to give notice of the election, and of the offices to be filled, and the notice actually given by him makes no mention of the vacancy, this default of the clerk does not invalidate the election for this vacancy.

Digitized by Google

THE PEOPLE v. HARTWELL.

Statute, construction of: when directory. — The statute requiring this notice to be given is directory merely.

Notice of proceedings of city council. — Electors of a city are presumed to have notice of the proceedings of the common council, which are published in the official paper of the corporation. They are therefore presumed to have notice of a vacancy which has been declared by the common council.

Plea, conclusion of. — Information charging respondent with intruding into a public office; averring that an election to fill the office was held, that relator received a certain number of votes, and respondent a certain less number, and that relator was thereby elected. A plea to this information, that no election was held for the office, and that no votes were cast for that purpose, should conclude to the country, and not with a verification.

Heard April 16th and 20th. Decided July 15th.

Information in the nature of a quo warranto.

The information set forth that, in November, 1861, Thomas McEntee was duly elected city attorney of Detroit, and qualified as such, and entered upon the performance of his duties: that he removed from Detroit and thereby vacated the office on the first day of September, 1863, and by a resolution of the common council, duly approved and published in the official paper of the city, the office was declared vacant: that a general election was held in said city on the third day of November, 1863, at which a large number of votes, to wit: 2800 in number, were cast for the said John J. Speed for the office of "city attorney, to fill vacancy," that being the highest number cast for said office for any person; that a less number of ballots, to wit, fifty or less in number, were cast for the said Thomas H. Hartwell for said office of "city attorney, to fill vacancy," and that a large number of ballots, to wit, 2800, were cast for said Speed for the office of "city attorney, for the long term," and also a large number of ballots, to wit, 3000, for said Hartwell, for the office of "city attorney" (but did not designate whether for the vacancy or long term), and a small number of ballots, to wit, fifty, were cast for said Hartwell for the office of "city attorney, for the long term;" that on the canvass of said votes the city canvassers declared, as the result of said election, that said Speed was elected city attorney to

Digitized by Google

fill vacancy, and said Hartwell for the long term: that the city clerk notified said Speed of his said election, and of the amount of his official bond, and that he gave bond accordingly, took the oath of office, and entered upon the discharge of his duties. It then charges that said Hartwell intruded into and usurped said office, and unlawfully holds and exercises the same, to the damage of the said Speed of $100.

The subsequent pleadings were as follows:

First plea. And now, on this fifth day of January, 1864, comes the said Thomas H. Hartwell, in his own proper person, and having heard the said information read, for a plea in that behalf, with reference to so much, and such part thereof, as charges this defendant with having entered into, used, exercised, claimed and usurped the said office of city attorney, without any legal election, appointment, warrant or authority therefor, this defendant says that heretofore, to wit, on the first day of September, 1863, the said office of city attorney became and was vacant for the balance of the unexpired term thereof, to wit, down to the 12th day of January, 1864, when the next regular term would commence under and by virtue of the city charter of Detroit; that thereupon, on the first day of September, 1863, the common council of Detroit, being then in session, by a resolution, duly passed, entered and approved, according to law, appointed this defendant to hold said office during the remainder of said unexpired term thereof; and thereupon this defendant qualified, according to law, by taking the oath prescribed by law to be taken by the incumbent of said office, according to law, and fully entered into said office, and upon the discharge of its duties; that at the next general election in said city, held on the third day of November, 1863, there was no election to fill said office for said unexpired term, nor was there any notice given of said vacancy, or any election to fill it, nor has there been

Digitized by Google

any election, at any other time, to fill the same; that this defendant has been in no way removed from said office, but, on the contrary, on the 17th day of November, 1863, the said common council, being then in session, adopted or passed a resolution or motion, in due form of law, upon the report and recommendation of the judiciary committee of said council, that this defendant was the legal incumbent of said office, duly authorized to hold the same, and discharge its duties, until the 12th day of January, 1864, when his successor in said office, for the next regular two years term thereof, will duly qualify, according to section thirteen of chapter two, of the charter of said city; that this defendant claims to hold said office, and does hold it, with all its privileges, by virtue of such appointment, and the authority thereof, as it was lawful and proper for him to do; and this defendant will continue to claim said office until his successor shall qualify, as aforesaid; without this, that he in any way usurped said office, or entered into, used or exercised the same without warrant or authority of law; and this the said defendant is ready to verify.

First replication to first plea. And now, the said People of the State of Michigan, by Albert Williams, Attorney General of said State, who for the said People in this behalf appears, as to so much of the said plea of the said Thomas H. Hartwell, by him first above pleaded, as alleges that there was no election held to fill the vacancy in said office of attorney of said city of Detroit, say, that the said People ought not to be barred from prosecuting or maintaining said information against him, because they say that there was an election to fill said office of attorney of said city of Detroit, for said unexpired term, to wit, at the annual election of said city of Detroit, on the third day of November, 1863; and this the said People pray may be inquired of by the country.

On this replication the defendant joined issue.

Digitized by Google

Second replication to first plea. And the said People of the State of Michigan, for further replication in this behalf, as to so much of the said plea of the said Thomas H. Hartwell, by him first above pleaded, as alleges that there was no notice given of an election to fill the said office of attorney for said unexpired term, say that the said People ought not to be barred from prosecuting or maintaining said information against him, because they say, although true it is no notice was given of any election to fill said office of attorney for the said unexpired term, yet the said People say that the clerk of said city of Detroit, to wit, on the 8th day of October, 1863, did cause to be published in two daily newspapers published in said city, to wit, *The Detroit Free Press*, and the *Detroit Daily Advertiser and Tribune*, a notice, of which the following is a copy:

[Here follows a notice of the general election under the charter, specifying the several offices to be filled for the full term.]

And this the said People are ready to verify. Wherefore they pray judgment, etc.

Demurrer. The defendant demurred to said second replication, and alleged as causes of demurrer: *First*, That said second replication had not a proper conclusion. *Second*, The notice therein set forth was not in fact or law a notice to fill said office of city attorney for said unexpired term. *Third*, Said replication, on its face, admits that there was no notice of an election to fill said office for said unexpired term. *Fourth*, Said second replication is, in other respects, uncertain, informal, and insufficient.

Second plea. And for a further plea in this behalf, with reference to so much and such part of said information as sets forth a pretended right in the relator, John J. Speed, to hold said office, this defendant says that no public notice whatever was given of any vacancy in said

Digitized by Google

office of city attorney; that the electors of said city had no notice of the same; that no notice was given of an election to fill said vacancy, to be held on said November 3d, 1863, or at any other time; that the electors of said city knew of no such election, and did not vote to fill any such vacancy, on said day, or any other day, and no votes or ballots were cast for said office to fill any such vacancy, on said day, or on any other day, and said Speed has received no legal certificate of any such election from any board of canvassers, or any other competent authority; and any steps he may have taken to qualify for said office, or to enter upon its duties, are null and void; without this, that there was a notice of said vacancy and election, or that there was an election to fill it, and that votes were cast to fill it, or that said Speed was elected to fill it, or is in any way in law entitled to said office; and of this the said defendant puts himself upon the country.

Demurrer. The People demurred to this second plea, and alleged the following causes of demurrer: *First*, That the said Thomas H. Hartwell hath, in and by his said second plea, offered to put in issue matter not properly issuable; and, *Secondly*, That the said second plea ought to have concluded with a verification, and not to the country; and that the said plea is in various other respects informal and insufficient.

Third plea. And for a further plea in this behalf, with reference to so much and such part of said information as sets forth an election held, and votes cast to fill the office of city attorney, for the term of two years, commencing, according to the city charter, on the second Tuesday of January, that is to say, the 12th day of January, 1864, this defendant says that there was a general election held on the third day of November, 1863, in said city, to fill the office of city attorney of said city, together with the other offices generally thereof, for the term of

Digitized by Google

two years, commencing on the second Tuesday of January, 1864; that due notice was given, according to law, of such general election; that at such general election, a large number, to wit, seven thousand votes, were cast by the electors of said city to fill said office of city attorney, for said two years term, denominated the "long term" in said information; that of said votes thus cast for said office of city attorney, this defendant received a large majority, to wit, five thousand of all the votes cast; that he was consequently duly elected to fill said office for said term of two years, and he received his certificate of election thereto from the proper board of canvassers, and will be ready to qualify to enter upon the duties of said office, for said term, on the second Tuesday of January next, according to the city charter; without this, that he has in any way intruded into said office for said term, or that said John J. Speed was elected to the same; and this the said defendant is ready to verify. Wherefore this defendant prays judgment, etc.

Demurrer. The People demurred to said third plea, and alleged as causes of demurrer, that the said Thomas H. Hartwell hath, in and by his said third plea, offered to put in issue matter not properly issuable and immaterial; and that said third plea is in other respects informal and insufficient.

J. J. Speed, in person, and *G. V. N. Lothrop,* for the relator:

1. The real issue made by the demurrer to the second replication to the first plea, is, whether it was necessary that a separate and distinct notice, under all the facts disclosed by the pleadings, should have been published to make the election valid.

It is submitted that the charter imperatively required the vacancy to be filled at the annual election in November, and of this the electors were bound to take

Digitized by Google

notice, as they are conclusively presumed to have known the law.

By the publication of the resolution of the common council declaring the vacancy, the electors were duly informed that a vacancy had occurred. But even without this, it is submitted that there would be little danger in holding that the electors are presumed to know when vacancies occur, and what officers are required to be elected. With the multitude of office seekers and politicians in this country, and an active and enterprising political newspaper press, it would be strange if the electors were allowed to remain ignorant that any office subject to their disposal was vacant, especially an office like that in question.

By the general election notice given by the city clerk, the electors were informed of the places where the votes might be cast.

All the defendant could claim it was requisite that a notice of an election to fill the vacancy should contain, would be, *first*, a statement of the existence of the vacancy; *second*, that the law required the vacancy to be filled; *third*, notice of the time of the election; *fourth*, notice of the place of the election.

We claim that the electors had this notice.

They were informed of the vacancy by the publication of the resolution of the council — the publication being required by law—and when any matter of public interest is required to be published officially in the public press, we think it may be safely held that the public are bound by the notice thereby given.

Moreover, the electors may be presumed to have known the existence of the vacancy.

It will be conclusively presumed, that the electors knew that the law required the vacancy to be filled.

The charter fixes the time of the election, to wit: "the next annual election."

Digitized by Google

The places for casting the votes at the "annual election," are mentioned in the notice issued by the city clerk.

The relator was declared duly elected to fill the vacancy by the board of city canvassers, and was, therefore, *prima facie*, entitled to the office.

The following cases are respectfully referred to:—3 *Cal.* 477; 5 *Cal.* 343; 3 *Kern.* 350; 6 *Hill*, 646; 11 *Wend.* 611; 10 *Ind.* 68; 15 *Ind.* 327; 14 *Barb.* 290–292.

2. The second plea alleges, among other things, "that no notice was given of an election to fill said vacancy, to be held on said November 3d, 1863, or at any other time." And the plea concludes: "and of this the said defendant puts himself upon the country."

Demurrer to this plea was filed, and, as cause for demurrer, it was alleged that the defendant, in his plea, offered to put in issue matter not properly issuable, and that the plea ought to have concluded with a verification, and not to the country.

The allegation in the plea was one of new matter. In such case the pleading must conclude with a verification:—1 *Chit. Pl.* 557; 1 *Johns.* 91.

Concluding to the country obliged the People either to join issue or demur:—1 *Chit. Pl.* 599; 2 *M. & S.* 549.

3. The allegations of the third plea are confined wholly "to so much and such part of said information as sets forth an election held and votes cast to fill the office of city attorney for the term of two years, commencing, according to the city charter, on the second Tuesday of January, 1864."

It is only necessary to say that the information was filed November 30th, 1863. The information does not allege an election for the said term of two years; but in stating the votes cast, it was stated that a certain number of votes were cast for the defendant for the "long term;" also, in stating the result as declared by the canvassers,

Digitized by Google

it was mentioned that the defendant was declared elected for said "long term."

4. The statute gives the right to file the information without qualification; and, although the term of office has expired, the relator is entitled to a determination of his right to the office when the information was filed.

The relator, if the determination be in his favor, may file a suggestion that he has sustained damages:—§ 5297, *Comp. L.* The information alleges that damages had been sustained by the relator. A determination of the right of the party is preliminary to the recovery of damages.

If the defendant be adjudged guilty, a fine may be imposed; § 5311, *Comp. L.* The relator is entitled to recover costs if the defendant is guilty of the usurpation alleged; § 5312, *Comp. L.*

See following cases:—1 *Wm. Bl.* 93; 2 *M. & S.* 75; 2 *Strange*, 952; *Ibid.* 583; 8 *Wend.* 396.

L. Bishop, for respondent:

The office having expired, the proceeding should be dismissed.

The Court can not now enter the appropriate judgment in such a proceeding, which is ouster from the office, or that the defendant is entitled to remain in it:—3 *Bl. Com.* 263; 4 *Ibid.* 312; 2 *Comp. L.* § 5311; 5 *R. I.* 1–7.

The judgment, if one is rendered, must be of the present tense when rendered. See form of judgment in 11 *Mass.* 339.

How can the Court oust the defendant from, or adjudge him entitled to, that which no longer exists?

Judgment of ouster will not be entered, where the respondent has ceased to exercise the duties of the office in question:—12 *Ohio St.* 130, 136. See also, *Wright*, 231, 237; 17 *Ohio*, 143; 2 *Johns.* 184; 3 *Mass.* 285; 19 *Geo.* 559.

It is true the court in England, as in this State, under

Digitized by Google

the statute, may impose a fine, as an *incident* to the principal judgment. But where there is no pretence of improper motives, on the part of the defendant, as is the case at bar, the fine is only nominal: — 5 *R. I.* 1, 11.

And, even in such cases, in England, the writ or information will be denied, if the term of office has expired. *Note to* 4 *Q. B.* 648.

The statute has made this a remedial process in favor of the person, other than the defendant, who may be found entitled to the office in question. But how shall the Court adjudge Mr. Speed entitled to an office that no longer exists?

As *incidental* to the principal object of the suit, the relator, if adjudged entitled to the office, might have his damages assessed: and costs may also be given.

But the Court, in prosecutions of this kind, will not entertain, or retain, the case, upon these secondary and incidental grounds, where the principal ground fails: — 4 *East*, 327, 336.

As to the demurrer to the second plea of the respondent.

1. The second plea is a simple negation of facts which are averred or necessarily implied in the information, and there is no one fact thus denied, which is immaterial, upon which an immaterial issue could be formed. The first cause of demurrer, as assigned, is therefore bad.

2. As to the second assigned cause of demurrer: a plea or other pleading, which is a mere negation or contradiction of the pleading to which it is an answer, must conclude as this does, to the country: — *Steph. Pl.* 230, 433.

As to the demurrer to the third plea of the defendant.

There is in the information enough to justify the conclusion that the relator intended, if possible, to weave into it enough to give himself the office of city attorney, not for the term of the vacancy only, but for the regular term of two years.

Digitized by Google

It was against this singular feature of the information that the third plea of the defendant was aimed.

As to the demurrer of the defendant to the second replication of the People, to the first plea of the defendant.

1. The replication should have concluded to the country. The respondent, in the first place, had averred that there was no notice of any election to fill the vacancy at the general election. This the replication denies, by setting forth what is claimed in legal effect as such notice. There is, therefore, the direct negative and affirmative averment, on the same point. In such cases the conclusion must be to the country: — *Steph. Pl.* 230, 433.

2. This replication is otherwise clearly informal, contradictory and bad. It expressly admits that there was no notice of an election to fill the vacancy in question, and then sets out a notice of an election of city officers, that of attorney included, "whose term of office will commence on the second Tuesday of January, 1864." This is a strange notice for what it is claimed to be; that is to say, a notice is claimed, to fill a vacancy which was to terminate on that same second Tuesday of January, 1864.

We think we might safely rest our case here. But as we are formally called upon to show by what authority we filled the vacancy in question down to the second Tuesday in January, 1864, we will proceed to show that authority.

The record shows that no notice whatever of an election to fill this vacancy was given.

There was no intention on the part of the electors of Detroit to fill the vacancy; and "if the intention of the voters can be ascertained with reasonable certainty," that intent must prevail: — *People v. Bates*, 11 *Mich.* 364, 366, 368; *People v. Cook*, 4 *Seld.* 67, 81; 17 *Ill.* 167; 34 *Barb.* 620; 22 *N. Y.* 309.

It is proper to "look at the number and character of the ballots cast," in order to determine a question of elec-

Digitized by Google

tion, and by them we may be "forced to the conclusion that there has been a failure to hold an election" for a given office, and that such "office therefore remains vacant": — *People v. Canvassers of Kent Co.*, 11 *Mich.* 112, 113.

The notice set out in the record seems to have been given, "By order of the common council," pursuant to the charter; and the resolution of the council, passed on the 7th day of November, 1863, on the report of the judiciary committee thereof, after this controversy had been raised by the relator, that the respondent was then the "legal incumbent of said office, duly authorized to hold the same and discharge its duties, until the 12th day of January, 1864, when his successor in said office for the next regular two years term thereof will duly qualify, according to section 13, of chapter two, of the charter of said city," shows very clearly what the intent and understanding of that body were in giving the notice of the election, and as to what officers were to be chosen.

To us, it appears simply absurd, that the statement of the vacancy printed among other proceedings of the common council, on the third day of September, 1863, should be urged as actual or constructive notice that an election to fill a vacancy in said office would be held in Detroit on the 3d day of November thereafter.

There being no law authorizing notice of such a vacancy to be thus given to the public, the proceedings of the council thus published were a simple nullity, with reference to such object: — 10 *Ind.* 62, 67.

The respondent was appointed to fill the vacancy on the 1st of September, 1863. He was to hold the office under the charter "until the next annual election": — *S. L.* 1857, *p.* 80, § 26.

Of course, this provision pre-supposes that a regular, valid election to fill the vacancy will be held at such "next annual election."

Digitized by Google

If such regular election to fill the vacancy should not take place, then, of course, under another provision, the incumbent "would hold his office until his successor would be elected or appointed and qualified, and should enter upon the duties of his office." *S. L.* 1857, *p.* 77, § 13.

Or, if it be said that the appointment of the respondent only continued till the "next annual election," then, there having been no valid election to fill the vacancy, the resolution of the council, before referred to, of November 7, 1863, that the respondent was the legal incumbent of said office, duly authorized, etc., had the effect of a re-appointment of the respondent: — 22 *Barb.* 72.

The relator admits, in the record, that there was no notice given of an election to fill this vacancy; and we contend that, without such notice, no election to fill it, and no votes cast for the purpose of filling it, could be valid.

[In this connection counsel cited and commented on, 15 *Ind.* 327; 3 *Cal.* 477; 14 *Barb.* 259; 2 *Cal.* 135; 6 *Cal.* 26; 8 *Ohio St.* 620; 11 *Cal.* 49; 12 *Cal.* 409; 10 *Ind.* 62; 17 *Ind.* 554.]

Actual, formal notice might not be necessary, if "the people had, in truth, been called upon, and had spoken; and if *no portion* of them failed in knowledge of the pendency of the question, or to exercise their franchise": — 10 *Iowa*, 212; 7 *Iowa*, 186; 9 *Iowa*, 334.

It can not be pretended that the electors of the city generally knew of an election to fill this vacancy. In this respect the case is clearly distinguishable from *People v. Cowles*, 3 *Kern.* 350.

In that case, also, the vacancy occurred less than fifteen days before the general election, in which case no notice at all of the vacancy, "with reference to an election to fill it," was required by law to be given: — *Ibid.* 358, 361.

Digitized by Google

THE PEOPLE v. HARTWELL.

MANNING J.:

The motion to dismiss the information, for the reason that the term of the office which respondent is charged with having usurped has expired since the filing of the information, must be denied. If the only object of the proceedings was to oust the incumbent, there would be great propriety in granting the motion. But the statute under which the information is filed provides for the imposition of a fine, in the discretion of the Court, and the payment of costs by respondent should he be found guilty of the intrusion: — *Comp. L.* § 5312, 5311. And when the office is claimed by another, the information may be so framed, as in the case before us, as to try the right of such person to the office, who, on obtaining a judgment in his favor, at any time within one year thereafter, may make and file a suggestion that he has sustained damages to a certain amount by reason of the usurpation, and pray judgment therefor against respondent: — *Comp. L.* §§ 5293, 5297. And such information may be filed without leave of the Court: — *Comp. L.* § 5291. When it is necessary to obtain leave of the Court to file the information, the Court may, in its discretion, refuse to permit the information to be filed. In the case of *The People v. Sweeting*, 2 *Johns.* 184, the Court refused to give leave because the term of office would expire, and the office be filled by an election, before the proceeding to oust the incumbent could be made effectual. And in *The Commonwealth v. Athearn*, 3 *Mass.* 285, leave was refused on the ground that the term of office would expire before the question could be tried. But in *The People v. Loomis*, 8 *Wend.* 396, the Court refused, under a statute like our own, to dismiss although the term of office had expired.

Before speaking of the pleadings, it will be necessary to refer to the city charter, and to the law of the case.

Digitized by Google

THE PEOPLE v. HARTWELL.

By the charter an annual city election is required to be held on the first Tuesday after the first Monday of November in each year, at such places in the several wards as shall be designated by an order of the common council at least twenty days previous thereto, notice of which, and of the officers to be elected, and of the time for opening and closing the poll, is required to be given within three days after the date of such order, by the city clerk, by publication in two or more daily papers published in the city: — *Laws* 1857, *p.* 82, § 1. A city attorney is to be elected, and to hold his office for two years: — *Ibid. p.* 74, § 1, *and p.* 77, § 13. And if an office becomes vacant, it may be so declared by the common council: — *Ibid. p.* 80, § 22. And if a vacancy occurs in any elective office, other than Mayor or alderman, the common council are to appoint some person eligible under the charter to serve in such office until the next annual election, when the vacancy is to be filled for the residue of the official term: — *Ibid. p.* 80, § 26. Such are the provisions of the charter bearing on the questions before us.

The common council declared a vacancy in the office of city attorney, and appointed the respondent to fill it. And the information states that the relator at the next annual election thereafter was duly elected to fill the vacancy, &c.

In the notice of election given by the city clerk, no mention whatever was made of the vacancy. Did this omission in the notice vitiate the election of the relator?

There can be no doubt had the notice omitted to state that there was to be an election of an alderman in each of the wards of the city at that election, that such omission would not have rendered void the election of such officers. The statute in this particular is directory merely. It is nevertheless the duty of the city clerk to see that it is carried into effect, and if he should wantonly and corruptly omit to give notice of the officers to be elected,

Digitized by Google

he may be punished therefor criminally. To go further than this and hold the election void, would place it in the power of the city clerk to defeat the election of any or all city officers to be elected at an annual election. Electors are supposed to know what officers are to be elected at a general election, and, if in doubt, can readily inform themselves. The design of the notice is to remind them of their duty to the public. It is in no way connected with the elector's right to the elective franchise; nor is it a condition precedent to be performed by another to entitle him to exercise the right. There is a material difference, it is said, between an election for a full term and to fill a vacancy. The charter makes none in the case before us, and we can not make any. We know of no rule of construction by which we can hold the notice both necessary and unnecessary; that is, necessary to the validity of the election of some officers to be elected, and not as to others. The alleged difference is, that an elector may not know of the vacancy, while he is presumed to know of the election of officers for a full term. He must however be presumed to have cognizance of the proceedings of the common council, which are published in the official paper of the corporation. And the vacancy was declared by that body, which, at the same time, appointed the respondent to fill it until it should be filled at a general election.

The first plea to the information admits the vacancy, states the appointment of respondent to fill it, by the common council, and says that at the next general election in said city, held on the third day of November, 1863, there was no election to fill the unexpired term. The People reply to this part of the plea, taking issue on the election to fill the vacancy, and conclude to the country. The plea admits the holding of the annual election, but denies it was an election to fill the vacancy. If the views we have expressed are correct, it was an election

Digitized by Google

to fill the vacancy, as well as for the election of officers for a new term; and the issue made by the plea and replication for a jury to try is one of law and not of fact. We mention this in passing, not that there is any question in regard to it now before us.

The plea further states, "nor was there any notice given of such vacancy." The People in their replication to this part of the plea admit its truth, and set forth in full a notice given of the city election which makes no mention of the vacancy; and conclude with a verification. The respondent demurs, and the People join in the demurrer. Want of notice we have stated does not vitiate the election. The plea consequently is bad. So is the replication, as it tenders an immaterial issue by the new matter set up in it. On this demurrer there must be judgment for the People, as respondent committed the first error.

Respondent's second plea, like the first, sets up various matters as a defense, none of which are material except the statement that the electors of the city did not vote to fill the vacancy, and that no ballots were cast for that purpose. The plea concludes to the country, and is demurred to by the People, in which the respondent joins, because, *first*, it offers to put in issue matter not properly issuable; and because, *second*, it does not conclude with a verification. It is not demurred to for duplicity. Neither of the objections stated in the demurrer is well taken. For if there were no votes given at the election to fill the vacancy, the relator could not have been elected, and that part of the plea is therefore material. And it should not conclude with a verification, as it denies, or puts in issue, a material allegation in the information, which states that a large number of ballots, to wit, 2800 in number, were cast for the relator to fill the vacancy. The issue formed by the information and plea, is, whether any votes were cast to fill the vacancy

Digitized by Google

at the election. If there were not, as we have stated, the relator could not have been elected. The information states that there were, and that the relator received the greater number of such votes; both which facts are material to show his title to the office, and both being material, respondent was at liberty to take issue on either of them.

The third plea is clearly bad, as it relates to the election of respondent for the full term, of which no complaint is made in the information.

There must be judgment for the People on the demurrer to the second replication to the first plea, and on the demurrer to the third plea, and for the respondent on the demurrer to the second plea, with leave to the People to withdraw their demurrer to that plea, and add the similiter. Neither party to have costs against the other.

CHRISTIANCY and CAMPBELL JJ. concurred.

MARTIN CH. J. did not sit in this case.

Digitized by Google

OCTOBER TERM, 1864, AT DETROIT.

[MEMORANDUM] RANDOLPH MANNING, one of the Associate Justices of the Supreme Court, having departed this life during the vacation preceding this term, and the vacancy on the bench not being yet filled, the present term was held by three Justices only.]

The People on the relation of the Attorney General v. The President, Directors and Company of the Bank of Pontiac.

Corporation: forfeiture of franchise by nonfeasance — The statute, *Comp. L.* §4854 which provides that "whenever an incorporated Company shall have remained insolvent for one whole year," &c., "it shall be deemed to have surrendered the rights, privileges and franchises granted" by its act of incorporation, "and shall be adjudged to be dissolved," is applicable to corporations chartered before the statute was passed.

The forfeiture must be declared in a judicial proceeding; and until the State chooses to insist upon the forfeiture, no one else has the right to question the existence of the corporation collaterally.

But when a corporation has been guilty of such a breach of the condition of its existence or continuance as to authorize a forfeiture of its charter, it can not legally atone for such misconduct, and avoid the forfeiture, by subsequent good behavior.

Where a bank became insolvent and suspended operations in 1840, and did not resume again until 1864, it was held that the State had not, by laches, lost its right to insist upon the forfeiture under the statute above quoted. The State shows sufficient diligence (if any is required) if it institutes proceedings and claims the forfeiture within a reasonable time after a resumption of business, or an attempt to resume, on the part of the corporation.

Only fourteen months of the chartered existence of the bank remaining unexpired, when it resumed business after a suspension of twenty-four years, the Court, if it has a discretion so to do under the statute, will not impose a fine instead of adjudging a forfeiture of the charter.

Submitted July 14th. Decided October 11th.

Digitized by Google

THE PEOPLE v. BANK OF PONTIAC.

Information in the nature of a quo warranto.

The Attorney General filed his information against the defendants, charging them with usurping banking franchises. The defendants filed their plea thereto, claiming to be exercising such franchises by virtue of a charter granted by the territorial council of the territory of Michigan, on March 26th, 1835, under which they organized April 23d, 1835. To this plea the Attorney General interposed three replications, the second and third of which only were considered by the Court. They are as follows:

"And the said Attorney General further saith, that the said People ought not to be barred etc., because he says that after the passage of the said act of incorporation in the plea of the said The President, Directors and Company of the Bank of Pontiac mentioned, and after the said The President, etc., had entered upon the business of banking, to wit: on the first day of May, 1840, large amounts of the bills, notes and evidences of debt of the said The President, etc., had been put into circulation by the said The President, etc., and then were in circulation; and that while the said bills, notes and evidences of debt were in circulation, to wit, on the day and year last aforesaid, the said The President, etc., by the fraud, neglect or mismanagement of them or of some or all of their officers or agents, became wholly insolvent and unable to redeem the said bills, notes and evidences of debt so in circulation, in specie or other lawful money of the United States; wherefore the said The President, etc., to wit, on the day last aforesaid, discontinued, ceased and closed their banking operations, and from that time afterwards, to wit, until the first day of February, 1864, neglected to resume their banking operations; and this he, the said Attorney General, is ready to verify," etc.

"And the said Attorney General further says, that the said People ought not to be barred, etc., because he says,

Digitized by Google

that after the passage of the said act of incorporation, in the said plea mentioned, and after the said The President, Directors and Company of the Bank of Pontiac had entered upon the business of banking, to wit, on the first day of May, 1839, the said the President, etc., received from sundry persons large sums of money on deposit, and that afterwards, to wit, on the first day of May, 1840, and while the said sums of money still remained on deposit with them, they, the said The President, etc., by the fraud, neglect or mismanagement of them, or of some or all their officers or agents, became wholly insolvent and unable to pay the said sums of money so deposited, in lawful money of the United States, wherefore the said The President, etc., to wit, on the day last aforesaid, discontinued, ceased and closed their banking operations, and from that time afterwards, to wit, until the first day of February, 1864, remained wholly insolvent, and neglected to resume their banking operations; and this he, the said Attorney General, is ready to verify," &c.

The defendants rejoined as follows:

"And the said defendants, the said President, Directors and Company of the Bank of Pontiac, as to the said plea of the said Albert Williams, Attorney General, secondly above pleaded in reply to the aforesaid plea of them the said defendants, protesting that the said replication and the matters therein contained are not sufficient in law to convict them the said defendants, of the premises in the said information above charged upon them, nor to remove them from the liberties, privileges and franchises aforesaid, and that they need not nor are they bound by the law of the land to answer thereto, yet for a rejoinder in this behalf, the said defendants say that they, the said President, Directors and Company of the Bank of Pontiac, afterwards, to wit, on the second day of February, 1864, and before the filing of the information in this behalf, and at Pontiac aforesaid, became and were, and ever since have

Digitized by Google

been, and still are, wholly solvent and able to redeem in the lawful money of the United States, their bills, notes and evidences of debt, and that they did then and there resume, and have since continued their banking operations; and this they, the said defendants, are ready to verify, etc.

"And the said defendants, the said President, Directors and Company of the Bank of Pontiac, as to the said plea of the said Albert Williams, Attorney General of the State of Michigan, by him thirdly above pleaded, in reply to the said plea of the said defendants, protesting that the said replication and the matters therein contained are not sufficient in law to convict them, the said defendants, of the premises in the said information above charged, nor to remove them from the liberties, privileges and franchises aforesaid, and that they need not nor are they bound by the law of the land to answer thereto, yet for a rejoinder in this behalf, the said defendants say that they, the said President, Directors and Company of the Bank of Pontiac, afterwards, to wit, on the second day of February, 1864, at Pontiac aforesaid, and before the filing of the information in this behalf, became and were and still are wholly solvent, and able to pay all sums of money on deposit received by them and remaining with them, and that they did then and there resume their banking operations, and have ever since exercised and still do exercise them, and that they are able and ready to pay all their indebtedness on demand; and this they, the said defendants, are ready to verify," &c.

The Attorney General demurred to these rejoinders.

A. Williams, Attorney General, and *T. M. Cooley* for the People:

The question involved in the case is whether, where a bank is chartered for a period of thirty years, and after being five years in operation, it then becomes insolvent, and unable to pay its circulating notes, and thereupon

Digitized by Google

suspends its operations until but a single year of its chartered life remains, it may then, after having for nearly five-sixths of its corporate existence totally failed in the object of its creation, excuse its corporate nonfeasances and misfeasances by simply showing that it has now, at the eleventh hour, become able to pay its debts, and again commenced issuing its bills?

That the charter of a corporation implies and requires that it shall perform the business for which it was instituted, and that a substantial suspension of the same after the commencement is a violation of the charter, is too well settled for question:—*Matter of Jackson Marine & Fire Ins. Co.*, 4 *Sandf. Ch.* 559; *Ward v. Sea Ins. Co.*, 7 *Paige*, 294; *State v. Bank of South Carolina*, 1 *Speers*, 433; *State v. Commercial Bank*, 10 *Ohio*, 539. See also, *Lumpkin v. Jones*, 1 *Kelly*, 27; *State v. Real Estate Bank*, 5 *Pike*, 596; *Commonwealth v. Commercial Bank*, 28 *Penn.* 383; *Attorney General v. Bank of Michigan*, *Har. Ch.* 315; *Cases collected in A. & A. on Corp.* § 774, *notes.*

Indeed the doctrine of these authorities is fully admitted by the pleadings, and the defense relied upon is, the resumption of business before information filed. Our position is, that where a misuser of their franchises has once been committed by a corporation, or a breach of the conditions enjoined upon them as conditions of their creation and continuance, sufficient to forfeit their charter, mere subsequent good behavior in such respects will not legally atone for such a cause of forfeiture:—*People v. Fishkill & Beekman Plank Road Co.*, 27 *Barb.* 458; *People v. Hillsdale & Chatham Turnpike Co.*, 23 *Wend.* 254.

The case before the Court is hardly a case of *subsequent good conduct.* There is here only an *attempt* to resume after twenty-four years suspension. The State had good reason to suppose, from the long inaction, that the corporation had designed a surrender of their charter.

Digitized by Google

Near the time of its termination, however, the authorities hear of an intention to resume.

The putting out a large circulation as the charter is about to expire is hardly consistent with honest intentions. The State, therefore, takes proceedings to insist upon the forfeiture which has occurred. But, before these proceedings can be actually commenced, the corporators succeed in throwing the doors of their office open to the public. At the very most, this case only amounts to an *offer* to return to good conduct.

But the State, under the circumstances, declines to accept it. The State has not acquiesced in the corporation returning to its business, and consequently has waived no right to insist upon the forfeiture. It has taken action immediately on the corporation evincing a design to resume.

But we claim that, by a general provision of statute, the charter in question is shown to be forfeited, by a total suspension of business for one year, and continued insolvency during that period: — *Comp. Laws*, § 4854.

The only question that can arise on this point is, whether this provision can apply to the corporation in question, which was chartered before the statute was passed. But applying it to prior charters takes away no vested right, violates no contract, and inflicts no punishment. It simply fixes a period beyond which a continued misuser or nonuser should be fatal to the corporate existence. A corporation has no right whatever to suspend the performance of its corporate duties. That it will do so is not usually within legislative contemplation when charters are granted. The right to suspend is certainly no part of the contract with this corporation.

It is not necessary for us to claim that this act applies to this corporation, so as to forfeit its charter for the suspension for a year *before* the act was passed. But we insist that it was competent to pass such a law looking

Digitized by Google

to the future, and applicable to pre-existing corporations. See *People v. Hillsdale & Chatham Turnpike Co.*, 23 *Wend.* 254.

The statute is in some sense a police regulation, and may be sustained on similar grounds.

It is also analogous to statutes of limitation. At most this corporation could only have the right to resume business after suspension, in a reasonable time. To fix that reasonable time must be within the proper province of legislation. It is always competent for the legislature to declare within what reasonable time a party shall assert his rights, and statutes of limitation which apply to pre-existing demands are to be construed as if the demands accrued at the date of the passage of the statute:—8 *Wend.* 661; *Lastly v. Cramer*, 2 *Doug. Mich.* 312.

T. Romeyn and *M. L. Drake* for defendants:

Can the State, after acquiescing for a long time in the suspension of business by a corporation, oust it of its chartered rights, on account of such suspension, after the corporation has resumed and is exercising its proper functions?

We concede that the acts stated in the replication afforded good ground for forfeiture, if there had been no resumption. We admit the doctrine of the duty of corporations to exercise their corporate powers, as expressed in *Ward v. Sea Insurance Co.*, 7 *Paige*, 297. This is a condition of the grant of the franchises. The corporation having been regularly formed, it is a condition *subsequent* that it shall discharge its legal duties, or the grantor may enter and oust it. Its right to its franchises, in such case, is a *voidable* estate. But such estate may be confirmed; and it is an elementary principle in relation to corporeal hereditaments, that if the condition is substantially complied with, at any time before the grantor has

Digitized by Google

made entry, he can not claim the forfeiture. He is deemed to have acquiesced and waived.

The position of the relator is, that insolvency for any time more than a year is ground for forfeiture, although there may have been a payment of adequate capital and an actual resumption of business before the information.

[Our statute declaring one year's suspension of business a cause of forfeiture, *Comp. L.* § 4854, is *cumulative* to the common law causes, and authorizes and requires a court to declare a forfeiture for such suspension: — *Bradt v. Benedict*, 17 *N. Y.* 93.]

Apply the doctrine to what we know historically to have been the course of the Michigan State Bank. After it had resumed, had acquired new stockholders and fresh capital, and become the leading institution in the State, would this Court have arrested its business and declared its charter forfeited?

Our first legal position is, that the continued suspension of business and admitted insolvency of the bank did not operate as a dissolution or surrender of the franchise. *Town v. River Raisin Bank*, 2 *Doug. Mich.* 538, settles this point. See, also, *Mickles v. Rochester City Bank*, 11 *Paige*, 125; *Atchafalaya Bank v. Dawson*, 13 *Louisiana*, 497.

We next contend that the resumption of business by the bank, before information filed, is an answer to the information. See *People v. Bank of Niagara*, 6 *Cow.* 211.

This case is criticised in 23 Wendell, at page 258, but it will be seen that in the last case *it did not appear that the corporation had complied with its charter when the suit was brought.*

We have been unable to find a single case in which the court has granted judgment of ouster for insolvency, or any other removable cause, not connected with the *creation* of the corporation, and not in the nature of a con-

Digitized by Google

dition *precedent*, and not admitting of being repaired, when such cause had ceased to operate.

The *analogies* of the law are all against it. If a tenant is bound to repair or to do any other thing, and omit it, and the landlord do not enter while the tenant is in default, can he do so after the tenant has complied with the agreement?

There may be cases where there can be no atonement — where there have been acts of *malfeasance*, positive and willful. But where the act complained of is in the nature of a *nonfeasance*, as the non-election of directors, or the permitted dormant state of the corporation, and no action is taken by the State until such cause has been removed, it is believed that no instance can be found where a forfeiture has been declared.

We insist, further, that this rule of law is supported by the undoubted history of corporations in this country.

Finally, we ask the Court to regard the *consequences*.

The question is upon *the general principle* involved in the decision sought by the Attorney General. More than half of the mining companies on Lake Superior would fall before its application.

And where an information has been allowed by the Court to be filed, or where it is filed by the Attorney General officially, the Court has no discretionary control over the proceedings, but must pronounce the strict judgment of the law: — *State v. Brown*, 5 *R. I.* 1.

CHRISTIANCY J.:

By an act of the Legislature, of April 5th, 1839 — Laws of 1839, p. 104, § 49 (which, with slight alterations of phraseology, was incorporated in the Revised Statutes of 1846, Chap. 117, § 8.; Comp. L. Ch. 155,) — it was expressly provided that, "whenever any incorporated company shall have remained insolvent, or shall have neglected or refused to pay its notes or other evidences of debt, or shall have

Digitized by Google

suspended the proper and legitimate business of such corporation, for one whole year; it shall, in either case, be deemed to have surrendered its rights, privileges and franchises, and shall be adjudged to be dissolved."

The rejoinder of the respondents to the second replication admits that, having previously organized and entered upon the business of banking, the corporation became insolvent on the first day of May, 1840, and on that day ceased, discontinued and closed their banking operations, and from that time until the first day of February, 1864, neglected to resume such banking operations; but alleges that, on the second day of February, 1864, they became and were, and ever since have been, and still are, solvent; that, on the last mentioned day, they resumed and have since continued their banking business.

The rejoinder to the third replication admits that, having previously organized and entered upon the business of banking, the corporation became insolvent on the first day of May, 1840; that on that day they discontinued, ceased and closed their banking operations, and that from that time until the first day of February, 1864, they remained insolvent and neglected to resume their banking operations; but alleges that, on the second day of February, 1864, they became and were, and ever since have been, and still are, solvent; and that they then resumed their banking operations, and have ever since exercised, and still do exercise them, &c.

These admissions bring the corporation directly within the provisions of the act of 1839, and the Revised Statutes above cited, so far as relates to the continued insolvency and suspension of business for a year.

We see no reason to doubt the validity of the statute, either in its application to charters of incorporation previously existing, or to those subsequently passed. Any of the grounds mentioned in the statute, upon which a surrender is to be presumed and the corporation is to be

Digitized by Google

dissolved, would have been good cause of forfeiture at common law; and this though they might not have continued for an entire year. Each would constitute a violation of the duty which the corporation, by accepting the charter, undertook to perform, as the consideration of the grant. And it is well settled that it is a tacit condition annexed to every grant of incorporation, that the corporation shall act up to the end or design for which it was incorporated: — *Ang. & A. on Corp.* § 774. And see *Matter of Jackson Marine & Fire Ins. Co.*, 4 *Sandf. Ch.* 559; *Ward v. Sea Ins. Co.*, 7 *Paige*, 294; *State v. Bank of South Carolina*, 1 *Speers*, 433.

The respondents do not deny the correctness of this position: they admit that the acts or derelictions stated in these replications, and admitted by the rejoinder, would constitute good ground of forfeiture if the bank had not become solvent and resumed business before the filing of the information. But it is insisted that the bank did not become, *ipso facto*, dissolved for the causes mentioned; that its corporate existence continued till the State should see fit to enforce the forfeiture; that the failure of the State to insist upon the forfeiture, by the institution of judicial proceedings, must be construed as an acquiescence, on the part of the State, in the failure of the corporation to perform the condition of the grant, and that this acquiescence, having continued until the corporation became solvent and resumed business, operates in some way as a remission of such past transgressions, or a waiver of the right to insist upon a forfeiture on that ground.

It is true the facts admitted did not operate, *ipso facto*, to dissolve the corporation without a judicial proceeding for that purpose; this was necessary on the part of the State to ascertain judicially the existence of these facts; and until the State chose to insist upon the forfeiture, no one had a right to question the existence of the corporation collaterally. The State might, through the Legislature,

Digitized by Google

choose to waive the forfeiture entirely; and we are bound to presume they would do so in all proper cases. But I am not aware of any case in which it has been decided that a corporation, having been guilty of such a breach of the conditions of its existence or continuance as to authorize a forfeiture of its charter, could legally atone for such misconduct, and avoid the forfeiture by subsequent good behavior. The contrary has been several times held in the courts of New York: — *People v. Fishkill and Beekman Plank Road Co.*, 27 *Barb.* 458; *People v. Hillsdale and Chatham Turnpike Co.*, 23 *Wend.* 254; and see *Matter of Jackson Marine and Fire Ins. Co.*, 4 *Sandf. Ch.* 559. In the case above cited from 23 Wendell, 254, was it justly said by the court that "the argument [the same here urged by the respondents] goes to prove that a corporation may practice all manner of abuses, by commission or omission, if it be careful to stop before the Attorney General can be informed and institute a prosecution." In *The People v. Bank of Niagara*, 6 *Cow.* 211, relied upon by the counsel for the respondents, no such question was involved.

We can see no ground for holding that the neglect of the State to prosecute for a forfeiture in this case should operate as an acquiescence on the part of the State in the breach of the conditions of the charter, or as a waiver of any forfeiture for such breach. This corporation became insolvent and suspended its corporate business in the face of an express statute of the State then and ever since in force, which expressly declared that any corporation, remaining thus insolvent or thus suspending its business for one year, should be deemed to have surrendered its corporate rights and franchises. The neglect, therefore, of the corporation for one year to restore its solvency, or to resume its business, would justly authorize the legislative and the executive departments of the State to infer that the corporation intended, by this neglect, to abandon or

Digitized by Google

surrender to the State all claim to any corporate rights or franchises; that it had no intention to attempt their resumption, and that no proceeding on the part of the State would therefore become necessary to put an end to its corporate existence; and this inference would naturally be strengthened with every year's continuance of such neglect. The Legislature would naturally act upon this inference, in judging of the propriety of granting other charters of incorporation, to supply the public wants or convenience which this corporation had once been designed but had failed to subserve. See opinion of the Vice Chancellor in *Matter of Jackson Marine and Fire Ins. Co.* above cited.

We think, therefore, that after this corporation, in the face of this statute, had allowed itself to remain insolvent and its corporate powers to lie dormant without an attempt to fulfill the purposes of its creation for a whole year, the State shows sufficient diligence (if any be required) if it proceed to institute proceedings, and to claim a forfeiture, within a reasonable time after it is informed of the first visible manifestations of returning life, or of the first public indication of an intent to assert its legal existence by the exercise of its original franchises. The resumption of business, therefore, or the attempt to resume after having remained insolvent, and to all outward appearance inanimate, for nearly a quarter of a century, is rather a justification for, than a bar to, this proceeding by *quo warranto*. The People are therefore entitled to judgment upon the demurrer to the rejoinder, with costs.

In some cases of *quo warranto* against corporations, where the forfeiture is sought on the ground of a usurpation of some power not granted by the charter, or for some single act of misfeasance, malfeasance or neglect, and the corporation has been found guilty, courts have exercised a discretion, and imposed a fine, instead of adjudging a forfeiture of the charter. But if we have any discretion under

Digitized by Google

this statute, which expressly declares that the corporation shall for such acts or dereliction be dissolved—a question we shall not here discuss—we are unable to discover any fact or circumstance in the conduct of the respondents to call for the exercise of such discretion in mitigating the penalty of forfeiture which the statute has pronounced.

After having remained insolvent and ceased to transact business for nearly twenty-four years, they make this ostensible attempt to resume, and to assert the right of issuing bank notes, when less than fourteen months of their chartered life remained, and when, if it had all along continued its business, and been actuated by honest motives, it would naturally be making arrangements to call in its paper and to close its business. The attempt to resume under such circumstances, and at so late a period of its chartered existence, is at least somewhat suspicious, and not calculated to produce the conviction of an honest purpose. The judgment of the Court must therefore be, that this corporation has surrendered its rights, privileges and franchises; that it be ousted and altogether excluded therefrom, and that the corporation be dissolved.

The other Justices concurred.

Charles P. Avery v. Chauncey S. Payne.

Chauncey S. Payne v. Charles P. Avery.

Partition between tenants in common: agreement between them inconsistent therewith.—The statute—*Comp. L.* §4616—which provides that "all persons holding lands as joint tenants or tenants in common may have partition thereof in the manner provided in this chapter," does not prevent such tenants from making contracts, modifying or limiting their otherwise incidental right to a partition, either at the time of creating the joint interests, or afterwards.

Digitized by Google

AVERY v. PAYNE.

Where the owner of lands conveyed an undivided moiety to another, for a sum of money less than its value, to be paid from the proceeds of sales to be made thereof, and secured by mortgage on the lands, and a part of the consideration consisted in the services of the purchaser in taking charge of and selling the joint property under a contract between them, and a principal part of the seller's security for the purchase price and for the efficiency and fidelity of the purchaser in the management and sale of the property, consisted in the control he would have over the sales of the purchaser's interest, it was held that so long as the seller was not guilty of refusal to perform his part of the contract, or of any default which would relieve the purchaser from the obligation to perform, or prevent his performance, the latter was not entitled to partition.

Mortgages executed by the seller on his undivided half, not alleged or shown to have interfered with sales, or otherwise to have operated to the prejudice of the purchaser, will constitute no reason for partition.

Costs.— Bill and cross bill. In the court of chancery the latter was dismissed and the former sustained. On appeal to the Supreme Court both bills were dismissed, but, under the circumstances each party left to pay his own costs in the Court below.

Heard, July 6th, 7th, 8th, 10th, 11th, and 12th. Decided, October 18th.

Appeal in chancery from Genesee circuit.

The original bill was filed by Avery for a partition of certain lands situate in the county of Genesee, of which the bill alleges complainant and defendant are tenants in common, each owning an undivided moiety; that complainant became such owner and tenant in common by a deed of conveyance from defendant Payne and wife on or about the 19th day of February, 1856; that complainants at the time of such conveyance gave back to Payne a mortgage, accompanied by his bond, to secure the payment of twenty-five thousand dollars out of the proceeds of sales of the said premises according to the terms and conditions specified in said bond; that a portion of this sum had already been paid, complainant consenting that whenever the partition should be made, the mortgage for so much as should be then due should be a charge and lien upon the parts or portions which should be set off to complainant.

The bill also states that defendant Payne has since said conveyance to complainant incumbered his undivided half of certain pieces or parcels of the premises, by three sev-

Digitized by Google

eral mortgages to Crane, Youngs and Newton, which the bill prays may, after such partition, be a charge only on the lots or parcels allotted to said Payne. The bill in other respects is an ordinary bill of partition.

The answer of Payne admits the execution of the deed from himself and wife to complainant, but avers that it was intended to convey the undivided half of only parts and not the whole of the premises purporting to be conveyed by it, that it was drawn by complainant, and that complainant was at the time acting not only for himself but as the attorney and legal adviser of defendant, and that defendant reposed special confidence in him, as such, and that he would draw the same according to the understanding and agreement between them, and that complainant assured him that the deed was so drawn; that he, relying upon such assurance, executed it without particular examination, and without taking other advice than that of complainant, who was the only legal adviser of defendant in that business. Defendant avers that he has since ascertained that complainant fraudulently, and with intent to cheat defendant, drew the deed so as to embrace more land than complainant was entitled to according to the terms of the previous agreements and understanding between them, and more than he had agreed to convey. Claims that the deed is for this reason void: that previous to the execution of the deed, it was agreed between the defendant and complainant, substantially, that defendant would sell and convey to complainant an undivided half of certain parcels of land which, with certain other parcels, are embraced in said deed, for the sum of $25,000, to be paid to defendant by complainant out of the proceeds of sales of the said undivided half; the full amount of such proceeds to be paid over to the defendant as fast as sales could be made until the $25,000 should be fully paid; and that in case for any reason any portion of such proceeds should be retained by complainant, he should pay

Digitized by Google

to defendant interest on such portion till the same should be paid to defendant; and that, as a portion of the land was productive, complainant should pay defendant, annually, five hundred and sixty dollars, as the estimated though not the real amount of the yearly income expected to be derived from the undivided half of such productive portion: and that it was further at the same time agreed, that complainant should, without charge, take the oversight and management of the whole of the lands, an undivided half of which was to be conveyed as aforesaid, and should attend to the selling thereof, and to the collection of the purchase money, and of rents, income and profits of such parts as were productive, and in case of the absence of defendant, or whenever complainant should be desired by the defendant to do so, he should attend to and transact the business of the defendant generally, whether legal or otherwise, and should in all things and at all times protect, guard and secure the rights and interests of defendant, as well in all dealings and business transactions with the complainant himself, or in which he was concerned, as with all others — all which was to be without charge — complainant being attorney and counsellor at law, and defendant being a layman and entirely unlearned in law: that said deed was executed for the purpose of carrying out said agreement: that the bond and mortgage executed by complainant for the $25,000 were apparently intended, and by defendant understood, to secure to him the performance of said agreement: that they were drawn by complainant; that defendant did not at the time read said bond and mortgage, but was assured by complainant they were in accordance with said agreement, and took them in the full confidence they were so, but that the bond was afterwards found to be defective and was taken back by complainant and corrected, and not returned, but instead thereof complainant afterwards delivered to defendant another bond. This bond was in the penalty of

Digitized by Google

$50,000, conditioned for the payment of $25,000 out of the proceeds of the sales of the lands described in the mortgage accompanying the bond, as follows: one half of such proceeds, whether the same should be in cash or securities, to be delivered over to said Payne, his executors, &c., to be indorsed as payment on said bond: said Avery to be charged with interest upon securities while they remained in his hands, before delivery to defendant, and seven per cent interest on the cash proceeds which should so remain in his hands, to be paid as above provided out of said proceeds. In taking such securities said Avery to exercise ordinary prudence, and none to be considered indorsable thereon unless they have been taken upon sales fairly made and in good faith; said bond is also conditioned that "the sum of five hundred and sixty dollars each and every year until this bond is fully paid (that sum being the estimated value of the yearly rents and income of the productive property embraced in said mortgage), is to be added to the principal of this bond, to be paid as above provided, with interest on said sum to be computed from the first day of April each year, commencing with April 1st, 1857. But in case of the sale of said Avery's interest in any of the productive property aforesaid, a deduction is to be thereupon had, from the said $560, of an amount equal to the annual interest on such sale, and thereafter the balance only, after such deduction, is to be carried to said principal, and paid as above provided, with interest on such balance." Defendant avers that he did not read this bond, but heard it read by complainant, who stated it to be correct and in accordance with their agreement, and from the assurances and explanations of complainant in regard thereto, the defendant (not being capable, as complainant well knew, for lack of legal learning and knowledge, to determine the legal effect of the language used in the condition of said bond, and having the most perfect confidence in the

Digitized by Google

legal ability, competency, honesty and integrity of complainant, and relying upon him as his legal adviser) without exercising his own judgment, took it for granted and believed that the bond was substantially in accordance with the real agreement of the parties, and defendant took the bond in lieu of the other which had been taken back by complainant and retained by him.

If the Court shall find the deed valid, and that said bond and mortgage are not in accordance with the real agreement between the parties, defendant submits that they should be reformed and corrected by the Court, so as to conform to said agreement. He admits that certain payments have been made, but that said payments, deducting the interest, do not amount to over one thousand dollars. He denies that the premises are susceptible of partition as prayed for in the bill, and insists that it would be ruinous to defendant for partition of the premises to be made.

A replication was put in to this answer.

The defendant Payne also filed a cross bill, setting forth and enlarging upon the various matters of defense stated in his answer, and praying, among other things, that the agreement between him and Avery, the deed given by him, and the bond and mortgage given back by Avery, may be corrected and reformed by the decree of the Court so as to conform to the real agreement between the parties. As the Court found this bill not sustained by the testimony, it is unnecessary to set it forth, or to give any synopsis of the answer. And it is believed that the foregoing synopsis of the pleadings in the original case is sufficient, in connection with the opinion, for a full understanding of the points decided by the Court.

The two cases were heard together in the Court below, and a decree made dismissing the cross bill, and granting partition as prayed by the original bill. Payne appealed to this Court.

Digitized by Google

L. Walker, *W. Newton* and *G. V. N. Lothrop*, for the appellant, insisted, among other things, that partition would not be granted in opposition to the agreement of the parties, where they, or either of them, have assumed duties and obligations inconsistent with the unrestrained right to enjoy the property in severalty:—*Dart on V. & P.* § 434, *Colman v. Colman*, 19 *Penn.* 100; *Brown v. Lutheran Church*, 23 *Penn.* 495; *Holmes v. McGee*, 27 *Mo.* 597.

J. G. Sutherland, *C. P. Avery* and *A. B. Maynard*, contra, argued that a tenant in common was entitled to partition as a matter of right:—*Comp. L.* § 4616; *Smith v. Smith*, 10 *Paige*, 470: that the testimony showed Payne to have violated the spirit of the agreement between the parties in refusing to consent to proper sales, and that the incumbrances he had placed upon his interest were such an impediment to sales as prevented Avery having the full benefit of his ownership without partition.

CHRISTIANCY J.:

[After remarking upon the great and unnecessary length of the record, and the large amount of irrelevant testimony taken on both sides.]

Voluminous and excursive as the evidence is, it fails to throw any light upon some of the more important questions presented by the pleadings, and upon several others it is too slight to lead to a satisfactory conclusion. What were, in fact, all the features or provisions of the real agreement between the parties upon which the conveyance was to be made to Avery, and what was the real nature of some of the subsequent transactions between them in reference to the correction of the bond, &c., is left by the evidence in painful uncertainty. The knowledge of the facts, except as they appear by the written evidence, seems to have been mainly confined to the parties themselves. Answers under oath were waived, and the testimony

Digitized by Google

was taken prior to the act of 1861, allowing parties to be witnesses. A few hours examination of the parties would doubtless have thrown more light upon these cases than all the testimony which has been taken.

It is however clear from the pleadings and proofs, that Avery paid no pecuniary consideration at the time for the undivided half of the lands conveyed to him by Payne and wife, which he asks to have set off to him in partition, nor did he agree to pay any pecuniary consideration therefor, except from the proceeds of the sales to be made of the conveyed lands; that the price agreed to be paid from such proceeds was twenty-five thousand dollars; that the lands thus sold were, with a good title, worth some ten thousand dollars more than this sum; that Avery did not, under the conveyance which was executed to him, assume the risk of the title which was then in litigation, as that conveyance was by warranty, and it does not appear that Payne was not perfectly able to respond in damages if the title had failed (and we judge from the evidence his means were ample for this purpose). Whatever other services Avery was to render, or whatever other consideration Payne was to receive, it is clear that, as a part and a very material part of the consideration, without which Payne would not have consented to make the conveyance, Avery was by the agreement to take charge of and manage the common property after the conveyance (the half still belonging to Payne as well as that to be conveyed), and to make sales thereof without charge; that Payne would not be bound to assent to any sale which he might deem disadvantageous, though requested by Avery; that Payne relied, and, by the agreement between them, had a right to rely upon the common interest which Avery would have with him as a tenant in common, and the control he, Payne, would still retain over the sales (when called upon to deed) as his security for Avery's efficiency and fidelity in the management and sale of the property. We

Digitized by Google

think it also very clear that this common interest, and the power the arrangement would give Payne over the sales to be made of the common property, constituted a valuable security in his hands, as it would enable him to exercise to some extent an influence to prevent improvident sales of Avery's half, from the proceeds of which he was to receive his twenty-five thousand dollars purchase money. There is nothing in the evidence tending to show that Payne would have consented to make the conveyance without the security thus afforded; in other words, we can see nothing in the evidence to induce the belief that he would have been willing to have sold to Avery one half in value of the property in severalty, for the same consideration in other respects. That he would not for this consideration have thus sold in severalty, nor, if he supposed there was to be a partition, before the purchase money at least was paid, we think abundantly appears from the evidence.

To grant a partition, and allow Avery's portion to be set off in severalty before the purchase price is paid, while a large portion of the property remains unsold (which, for aught that appears, Payne is still anxious to sell), and before Payne has by his own default or otherwise released Avery from his obligations in this respect, would be to deprive Payne of a large portion of the consideration he was to receive for the land.

The conveyance was therefore made to Avery under and in pursuance of an agreement which was inconsistent with a present right of partition on his part; and no partition can be granted in the present aspect of the case, unless the statute — Comp. L. § 4616 — is imperative in such a case, or unless Payne, by his refusal to carry out his part of the agreement, or by some clear default on his part, deprived Avery of some portion of his rights under the agreement, or prevented his performance of it.

We think the statute can only be considered imperative

Digitized by Google

in its application to ordinary joint tenancies or tenancies in common, where the right of partition is left to result as an ordinary legal incident of such tenancy; and that it was never intended to interfere with contracts between such tenants modifying or limiting this otherwise incidental right; nor to render it incompetent for parties to make such contracts, either at the time of the creation of the tenancy or afterwards.

We have not been able to discover any satisfactory evidence of Payne's refusal to perform his portion of the contract, nor of any default on his part which would relieve Avery from the obligation to perform, or prevent his performance. It is true that, after a certain time, the relations of the parties ceased to be friendly, and they seem mutually to have ceased approaching each other upon business matters, and sales ceased to be made. But it does not appear that Payne ever wrongfully refused upon request to join in any proper sale, negotiated by Avery. And for aught that appears Avery might have continued to make sales of the common property as before, until the whole was disposed of.

On the part of Avery, however, it was strongly urged upon the argument, that the three mortgages executed by Payne, to Crane and to Youngs in November, 1858, and to Newton in May, 1859 (sometime after all sales had ceased to be made), operated as a breach of the spirit of the agreement between the parties, and put it out of the power of Avery to make sales, as he otherwise might have done: and that he can not therefore derive the full benefit of his purchase without a partition.

However well founded this position might be under certain circumstances, there are several conclusive reasons why the giving of the mortgages can not be allowed to confer a right to partition in the present case.

First. The complainant in the original bill has not placed his claim to a partition on any such ground, but

Digitized by Google

relies wholly upon the incidental right springing from a tenancy in common. To have enabled him to claim a partition on the ground now suggested, he should have set forth or relied upon the agreement in his bill, and alleged the mortgages and their effect in preventing or embarassing sales, as a breach of the agreement by Payne; perhaps also a request to Payne to procure the discharge of the mortgages. The question, whether the mortgages had in fact operated to prevent or retard sales, would then have been in issue, and might have been decided by proof. But no such question has been put in issue, and no such proof was therefore admissible. When Payne's answer was put in setting up the agreement, the bill should have been so amended as to present this point, if intended to be relied upon.

But *Second.* Had the bill contained these allegations, there is no proof to sustain them, or to show that the mortgages, in fact, proved detrimental to Avery in any respect.

And *Third.* While the Court can see that it would depend upon circumstances whether the mortgages would or would not operate to prevent or embarrass sales, they can not without proof judicially know what were the circumstances during the period in question, and can not therefore judicially say whether the mortgages did, in fact, thus operate. There may have been no opportunity during that period to make sales, had there been no mortgages; and purchasers may have been found willing to purchase at the full value of the property, assuming the mortgages as part of the purchase money. Partition should therefore be denied.

As to the cross bill, upon a full examination of the evidence, we are satisfied that Payne has failed to prove the original contract to be such as he has alleged in his bill, and that he has not, by his proof, shown sufficient

Digitized by Google

ground for cancelling or reforming the contract, or any of the subsequent papers.

The decree of partition granted in the Court below must be reversed, and both the original and the cross bill must be dismissed without prejudice.

Though Payne succeeds upon the appeal, yet as he fails upon his cross bill which called for independent, affirmative relief, and has introduced the larger share of irrelevant testimony, and is more responsible for the useless length of the record, it is but just that he should sustain a portion of the costs. Each party must therefore pay his own costs of these causes in the Court below, and Payne must recover his costs on the appeal.

The other Justices concurred.

Digitized by Google

Digitized by Google

DEATH OF JUSTICE MANNING.

At the opening of the Court at the beginning of the October term, HON. JACOB M. HOWARD rose to announce the death, during the preceding vacation, of HON. RANDOLPH MANNING, one of the Associate Justices of this Court, and presented the following resolutions adopted at a meeting of the bar of Detroit:

Resolved, That in common with the bar in other portions of the State, and with all the citizens of Michigan, we deplore the sudden death of the HON. RANDOLPH MANNING, Associate Justice of the Supreme Court, as a great loss to our whole commonwealth; and we take pleasure in bearing our united testimony to his pure and upright character as a Christian gentleman, and his learning and ability as a lawyer and a jurist.

Resolved, That as a member of an honorable profession; as Secretary of State for the State of Michigan; as Reporter of the Supreme Court; as Chancellor of the State; and as Associate Justice, he has in each and every position shown himself a man of untiring industry; of pure and spotless integrity; of a sound and discriminating judgment, and of a capacity and learning that has enabled him to fill those high positions with honor to himself and great advantage to the State which he has so long and faithfully served.

Resolved, That we tender our cordial and heartfelt sympathy to his children, in this their great and irrepara-

Digitized by Google

ble loss, and that the secretary of the bar be requested to furnish them with a copy of these resolutions.

Resolved, That Hon. Jacob M. Howard be requested to present a copy of these resolutions to the Supreme Court, at the opening of its next session.

In presenting these resolutions, Mr. Howard said:

May it please your Honors: In performing the duty thus imposed upon me by my brethren, I can not refrain from testifying my high regard for the memory of the deceased. I had the pleasure of his personal acquaintance and friendship from the time he landed at Detroit, in 1832, until his death, which occurred on the 31st of August last, at his home in Pontiac. He was a native of New Jersey, and studied his profession in New York city, whence he emigrated to Michigan at that early period while we were yet a territory. He settled in Pontiac, and there practiced the law. Under the act of January 26, 1835, passed by the Territorial Legislature, for the purpose of calling a convention for the formation of a State constitution, he was elected as one of the delegates from Oakland to the convention, which met in May of that year. In that body he bore a distinguished part, being a member of the Committee on the Judiciary, and as such associated with Hon. Ross Wilkins, Hon. William Woodbridge, Hon. I. E. Crary, Hon. Robert McClelland and others.

Under the act of March 26, 1836, a separate Court of Chancery was established, of which Mr. Manning was made Chancellor in 1842, as the successor of Hon. Elon Farnsworth. This high office he held for about three years, and performed its important functions in a manner that reflected the highest credit upon him both for integrity and professional learning. He was also Secretary of State during a gubernatorial term.

Under the act of February 16, 1857, providing for the present "Independent Supreme Court," he was elected a

Digitized by Google

member of this Court, in which he took his seat in January, 1858; his term of office expiring in 1862, he was re-elected to the same place in April, 1861. Thus he was a member of this Court from the time of its organization, and was the first of your number to answer the final summons of the great Judge of all living.

I adopt the language of the resolutions I have presented, and say that in each position he occupied before the public, Judge Manning showed himself a man of spotless integrity, of a sound and discriminating judgment, and of a capacity that enabled him to fill it with honor to himself and advantage to the State. Although untiring in his scrutiny of precedents and adjudged cases, he was trammelled by no slavish deference, no idolatrous reverence for the mere learning of the books; and his mind, ever honestly seeking after truth, ever sustained by an unfaltering love of justice for justice's sake, was intrepid enough to disregard all mere form, all the mere drapery of professional habit, and to seize boldly and at once upon the principle of justice discoverable in the case. Yet it must not be supposed that he was wanting in respect for professional learning or for books. No one was more a lover of law books than he; no one was more studious of their contents, and no one more habitually resorted to them for light and guidance. But such was the bravery of his moral nature that any array of supposed precedents or arguments, however formidable in appearance, that came in opposition to his own conscientious convictions of right, made but little impression upon him. He relied much upon the decisions of the moral sense, which, with him, was ever-living and ever watchful. Indeed, so sensitive and predominating was the faculty within him, so proud was he of communing with it, that his opinions had, to persons unacquainted with him, sometimes the appearance of unreasonable pertinacity. All, however, will admit that if this was an error, it was an error on the right side;

Digitized by Google

it shows an ever present sense of his obligation to administer impartial justice to all, to the high and the low, to the rich and the poor alike, and that his mission had imprinted upon his heart in indellible characters, *Justitia est constans et perpetua voluntas jus suum cuique tribuendi.* These peculiar qualities of his mind will be found to pervade his judicial opinions, alike while State Chancellor and an Associate Justice of this Court. And I take the liberty to add here that as specimens of judicial composition, their vigor, ease and perspicuity are not easily imitated. They exhibit, in my judgment, a remarkably pure and classical diction, a method admirable for its clearness, and a freedom from redundancy (the besetting fault of the language of the bench as well as the bar) worthy of all praise. His powers as a logician were also of a high order, and the student may well peruse his decisions as excellent and attractive specimens of reasoning, in which he will not fail to be struck with the clearness and force of his style, the concentration of his thoughts, and the worship he constantly pays to the goddess who presides in the temple where he ministers.

I need not say that in all the relations of private life he was as faultless as it has pleased Heaven to leave human nature. Gentle in manners, without ostentation, true and constant in his principles, charitable and forbearing, benevolent and kindly, frugal without parsimony, beloved of all his neighbors, the old and the young, the rich and the poor, taking an active interest in whatever concerned good neighborhood, in whatever affected the community at large, always doing his part in works of benevolence; without an enemy in the wide world, the good man has gone to his resting place only, we trust, to join the friends who have gone before him, to wait for those who shall as worthily do their duty here.

I move that the resolutions be entered upon the jour-

Digitized by Google

nal of this honorable Court, as a memorial of the respect of the Bar of Michigan for the memory of Judge Manning.

MORGAN L. DRAKE, GEO. V. N. LOTHROP and THEO ROMEYN, ESQR'S, seconded the motion of Mr. Howard in remarks eloquently expressive of their high regard for the pure and exemplary private and public character of the deceased, and of the great value to the State and to the profession of his long continued and faithful judicial labors.

MR. ROMEYN said:

I speak now because I am one of the few who knew Judge Manning in the early years of his professional life, and who have continued to know him intimately during the many years that have since passed. I have had much practice before him as Chancellor, and have frequently been associated with him as counsel. In no other person have I seen such simplicity, love of naked truth and exact justice, and such entire transparency and straight forwardness. It was his habit to examine and weigh the cases cited by his associate counsel, and to insist on excluding from the briefs such as he did not deem in his judgment as sustaining the positions for which they were cited. He would consent to retaining no authority nor argument that were not in his view entirely sound and appropriate.

As a Judge, his record is found in the volume reported by Mr. Walker containing his decisions as Chancellor, and in the volumes of our Reports, beginning with 5th Michigan. His opinions are marked by rigid induction, sufficient learning, perspicuous diction and an ardent love of justice. The strong conscientiousness and earnest conviction of their author, are apparent in every one of them.

Judge Manning was emphatically a man of principle. He was ever earnest, modest and free from self-assertion, he was strenuous and outspoken in vindicating what he

Digitized by Google

esteemed the right. He lived without reproach. He died in the ripeness of his faculties, loved by all who knew him and praised by all who named him.

> —— Cui Pudor, et Justitiæ soror,
> Incorrupta Fides undaque veritas;
> Quando ullum inveniet parem?

THE CHIEF JUSTICE, in responding to the remarks, also paid a feeling tribute to the eminent ability and noble characteristics of the deceased, and directed the resolutions presented by Mr. Howard to be entered on the Journal of the Court.

JUSTICE CHRISTIANCY said:

We can well appreciate the propriety of the resolutions presented by the bar, and the justness of the remarks which have been so well made in their behalf, upon the life and character of our lamented associate. As a man, as a jurist, as a friend, as a citizen, in every relation of life he was worthy the love and esteem of his fellow men, and in all respects a noble specimen of the Christian gentleman. Humble and unpretending in his intercourse with others, his character exhibited the simplicity and transparency of truth. The performance of duty, love for his fellow men and a patriotic devotion to the welfare of his country constituted his controlling motives. A man of such perfect candor, sincerity and earnestness, of such purity of mind and purpose, could not fail to secure the attachment and to inspire the esteem of all who knew him: and the more intimately he was known the stronger the attachment and the higher the esteem.

These were fixed traits of character, and not merely conventional, or assumed for the occasion. They were a part of the man himself.

He paid so little regard to all outward appearances, and was so adverse to display that he appeared to less advantage on public occasions than in the council room,

Digitized by Google

or in private conversation. What was said of one of the greatest of the ancients, may be truly said of him; "*To be*, and *not to seem*, was this man's maxim."

The strength of his convictions, his earnestness of purpose and manner, and the directness of his mode of expression sometimes gave to his remarks an appearance of bluntness, which by a stranger might be mistaken for harshness or unkindness. But no greater mistake could be made in the just estimate of his character. There was nothing harsh or censorious in his nature. He was kind, gentle and forgiving in his disposition; indulgent and charitable in his opinions of the conduct of others. Few men have so well succeeded in subjecting all their passions, propensities and habits to the control of reason and conscience.

Having been on terms of the most familiar intercourse with him for some years, it is but just to say that I never heard from him, even in the most unguarded moments, when his conversation was but thinking aloud, the expression of a single selfish or improper thought, or one which would not have done honor to the man, if uttered in public. His private conversation was well calculated to produce a higher appreciation of the dignity of human nature.

As a Judge, the bar as well as the bench have been witnesses of his ability and fidelity; and the administration both of law and equity in this State will long bear the impress of his enlightened, vigorous and active mind.

He was conscientious, laborious and faithful in the performance of his duties, as well in the council room as upon the bench. Cautious and patient in investigation, steadfast in his opinions, when formed; loving justice for its own sake; careful, almost in the extreme, to guard his mind from the influence of prejudice, and always endeavoring, as far as the imperfection of human administration would permit, to make the law an exponent of the Divine

Digitized by Google

injunction to do unto others as we would that others should do unto us.

The death of such a man is a public loss; and to us who have been associated with him upon the bench, and accustomed to listen to his counsel, it is a personal affliction. We feel it as the loss of a brother indeed. And struck down as he was suddenly, without premonition, in his usual health, in the vigor of his judicial life, the event is well calculated to make us realize that "our days upon earth are but a shadow," and that "in the midst of life we are in death." As a mark of public and individual sorrow and respect, it is fit that we should adjourn, and dedicate one day to the memory of our deceased brother.

JUSTICE CAMPBELL said:

It would be little more than a repetition of what has been so well said already, were I to refer at length to the public virtues of Judge Manning. And yet it would not become one who has been so attached to him as I have been, to refrain from bearing my testimony. I feel that he was a friend whom I could ill afford to lose. The bar were well acquainted with his worth and fidelity in all public stations, and these have been universally recognized. But there was an inner side to his character, which has been gracefully alluded to by my brothers Howard and Drake, and which, if it had been as well known to the bar as his public qualities, would have made him as universally loved as he was respected.

It was my good fortune to become intimately acquainted with him at the very outset of my professional career. Circumstances brought me into daily intercourse with him for a long time, and I learned to appreciate him as a friend to whom I have always felt a very strong personal affection. He was then presiding in our State Court of Chancery. And there were some erroneous impressions

Digitized by Google

which at that time prevailed concerning him, among some of the profession, which were as far as possible from the truth. No one ever questioned his honesty and sincerity. But an impression prevailed to some extent, that he was somewhat hard and austere in his character, without those warm feelings which most persons desire to find among their fellows. Nothing was further from the truth. It is not difficult for those who knew him well to understand how this impression was created. His disposition always led him to express his conclusions directly and without apology or circumlocution, in the fewest words possible. The business of his court was largely made up of litigated cases. There had been great commercial revulsions, and it so happened that questions of fraud very frequently arose. He had the most unbounded contempt for every kind of trickery and dishonesty, and when he expressed himself plainly and directly upon such a subject, in a case before him, it could hardly fail to offend some one. But instead of being hard and morose in his disposition, he was the reverse. No one can find in any of his judgments any harsh epithets, or needless aspersions of character. Nothing can be found which would be out of place in a judicial opinion. And I deem it no more than just to express the conviction, which I have always entertained, that the administration of equity in our Court of Chancery during its brief existence under our two Chancellors, will compare favorably with the course of any court which has existed in England or America.

Contrary to the impression I have alluded to, he was a man of enthusiastically warm feelings. His whole life was marked by a successful effort to keep them under the control of a strong will; and this habit of self-control led to an appearance of shyness and reserve, which gave him an air of coldness, but which were only outward marks of a determination that justice should never be swerved by feeling. He was always very decided in his

Digitized by Google

political views, but he was respected as much by his adversaries as by his associates; for he never took a mean advantage, and no one ever doubted the honesty of his convictions. He was extremely careful in his censures. During our long acquaintance, I never heard him express an uncharitable sentiment concerning any one. When the characters of men whom he knew were discussed in his presence, if he could say no good of them he preferred keeping silence; and nothing but a very direct appeal could draw from him anything on the subject.

He was a man of great kindness and sympathy. There was nothing he would not do to aid a friend or promote a good object. And in spite of his long experience of life, there was even a feminine gentleness which peculiarly marked his disposition. There was a freshness and simplicity in his nature, which was as open as that of an artless child, and this was especially manifested in the domestic scenes to which my brother Drake has so touchingly referred. He was the source of continual sunshine and peace in his own house. He sympathised with the feelings and enjoyments of his children as keenly as if he had been one of themselves; and they could always find him a ready listener to all their griefs and troubles, as well as a sharer in their happiness. He was not one of those fathers who keep their children in fear more than affection.

Nor can I avoid alluding to his earnest patriotism. His love of country was a burning passion. I have never known him so earnest or excited as when this feeling was called into action. And there is too much reason to believe that his life was shortened by the unhappy state of things which has existed for the last few years in this country. It oppressed his thoughts by day and his dreams by night. And I believe it to be in no small degree due to this nefarious rebellion that we have lost Judge Manning.

Digitized by Google

But I forbear enlarging on his merits. It is difficult to know where to leave off. I can assure the members of the Bar that they have not in any way exceeded the truth in their resolutions, and that the sentiments they have expressed are as well deserved as they are creditable to the good feeling of those who have caused them to be laid before us.

The Court thereupon adjourned.

Digitized by Google

Digitized by Google

INDEX TO CASES REPORTED.

ACCOUNTS.

See EQUITY, 4, 40 to 43.

ACTION.

1. *Action on assigned contract: not necessary to prove assignment.*— Where suit is brought on a contract in the name of the promisee *for the use and benefit of* another person named, the promisee is the legal plaintiff, and it is not necessary to show on the trial that the contract has been assigned to the person for whose use the suit is brought. — *Farwell v. Dewey*, 436.

ADMINISTRATOR.

See EXECUTORS AND ADMINISTRATORS.

AGENT.

See INSURANCE AGAINST FIRE, 6, 13; PLEADINGS, 5, 6.

ALIMONY.

1. *Construction of statute authorizing decree to be changed.* — The statute — Comp. L. § 3249 — which provides that, after a decree for alimony, the Court may, from time to time, on the petition of either of the parties, revise and alter such decree, &c., must be construed as only authorizing the change on new facts thereafter transpiring, which are of such a character as to make the change necessary to suit such new state of facts. — *Perkins v. Perkins*, 456.

Digitized by Google

AMENDMENT.

See PRACTICE IN SUPREME COURT, 1, 4; PRACTICE IN CIRCUIT COURTS, 3, 4.

APPEAL FROM CHANCERY.

1. *What not a "final decree."* — An order overruling a demurrer is not a *final* decree from which an appeal can be taken to the Supreme Court. — *Bennett v. Nichols*, 22.

2. *What is open to review on appeal.* — Where a demurrer interposed to a bill in equity is overruled, and the defendant then answers, and the case is heard on pleadings and proofs, and decree rendered against him, an appeal from the final decree opens for review the decision on the demurrer. — *Ibid.*

3. *What a "final order."* — An order of the Circuit Court in Chancery refusing to set aside a decree for irregularity, is a "final order" from which an appeal may be taken to the Supreme Court. — *Michigan Insurance Co. v. Whittemore*, 312.

4. *Motion to dismiss appeal.* — The right of appeal, in such a case, is a statutory right; and the Supreme Court can not dismiss the appeal on motion, on the ground that the granting of the application made to the Court below was discretionary. — *Ibid.*

5. *Reversal of decree for irregularity.*—A decree in chancery will not be reversed for an error in no wise affecting injuriously the interests of the party appealing. — *Michigan Insurance Co. v. Whittemore*, 427.

ASSIGNMENT FOR THE BENEFIT OF CREDITORS.

1. *Proof of fraud in.* — Where an assignment is assailed as fraudulent, the most liberal rules should prevail for the admission of any evidence which may tend to prove the fraud. The whole conduct of the assignee with reference to the property, after the assignment, should be allowed to be shown, as bearing upon the question of the intent with which the assignment was made; and if it tend to show that the assignor still claims and seeks to derive a benefit from the property, to the prejudice of his creditors, it will generally tend, in a greater or less degree, to show that the assignment was originally made with this fraudulent purpose. — *Flannigan v. Lampman*, 58.

2. The assignee does not stand in the position of a bona fide purchaser for a valuable consideration; and the fraudulent intent of

Digitized by Google

the assignor, in making the assignment, is sufficient to defeat the title of the assignee, though *he* may be innocent. — *Ibid.*

3. The defendant assailed an assignment as fraudulent; and having shown that one of the assignors bought of the assignee a horse and carriage, constituting a part of the assigned property, ostensibly as agent of his brother-in-law, who was a preferred creditor, and whose claim was alleged to be fictitious, he then asked the witness, "Who had and kept possession of said horse and carriage, after such sale, and up to the time of the present trial?" It was held that the question was proper, and the Court should have allowed it to be answered. — *Ibid.*

4. *Exceptions of exempt property.* — An assignment for the benefit of creditors is not void on its face for excepting property exempt from execution without specifying it. A bona fide selection is as practicable here as under a levy. — *Smith v. Mitchell*, 180.

5. *Interference with the property by the assignor.* — Where a general assignment for the benefit of creditors was assailed as fraudulent, it was held, that evidence that, at the time it was made, goods were at a railroad depot, directed to the assignors, which they claimed and disposed of afterwards, was competent, as having a bearing on the good faith of the assignment. — *Ibid.*

6. Evidence that said goods were afterwards sold with the knowledge and assent of the assignee, is competent, as tending to establish fraud. — *Ibid.*

7. *Conversion: proof of auction sales as evidence of value.* — Evidence of what the property brought at an auction sale made shortly after the alleged conversion for which suit is brought, is competent as having some tendency to prove its value. — *Ibid.*

8. *Conversion: evidence of prior liens.* — Trover by assignee for property levied upon by defendant by virtue of executions against the assignor. Held, that evidence on behalf of defendant, that property levied upon was held and sold under a former levy, was admissible, to show that defendant had not damnified the plaintiff and had not converted the goods. — *Ibid.*

9. Held, also, that evidence that goods levied on were held and sold for railroad charges which were a prior lien, would discharge defendant from any liability on account of the goods so sold; first, because showing that they were incumbered to their value: and second, because showing that he never took or converted them, the lien being adverse, and he never completing his levy by possession. — *Ibid.*

Digitized by Google

10. *General assignment must be of all the property.*—A voluntary assignment for the benefit of creditors, purporting to be general, is void, if it does not fairly and bona fide assign all of the assignor's property which is liable for the payment of his debts.—*Ibid.*

11. *Selection of assignee.*—The utmost good faith is required of the assignor in the selection of his assignee, and it must be made with reference to the interest of the creditors rather than that of the debtor. If the assignee be so deficient in age, health, business capacity or standing, pecuniary responsibility or character for integrity, that a prudent man, honestly looking at the interest of the creditors alone, would not be likely to select him, then his selection will furnish an inference, more or less strong according to the circumstances, that the assignor was actuated by some other motive than a desire to promote the interest of creditors.—*Angell v. Rosenbury*, 241.

12. *Insolvency of assignee.*—Where an assignment is assailed as fraudulent, evidence of a general reputation that the assignee was insolvent is admissible.—*Ibid.*

13. *Badges of fraud.*—Where it appears that the assignee, a short time before the assignment, as an inducement for a third person to loan the assignor money, stated that the latter was perfectly good, and not owing much; the setting up by him of a large preferred claim under the assignment, as having been owing to him before such statements were made, is strong evidence of fraud in the assignment.—*Ibid.*

14. *Assignment by one who is solvent, or believes himself to be so.*—The mere fact of the solvency or insolvency of one who has made a general assignment, or his belief in the one or the other, does not necessarily render the assignment void.—*Ibid.*

15. *Assignment to prevent sacrifice of property.*—The fact that a general assignment is made by an embarassed debtor, whether solvent or insolvent, to prevent a sacrifice of his property, does not necessarily, of itself, render the assignment void.—*Ibid.*

16. *Assignment may convey a fee without the word "heirs."*—In a conveyance in trust for the sale of land and for the payment of debts from the proceeds, the word "heirs" is not necessary to convey a fee. The trustee must be held to take an estate as large as may be necessary for the purposes of his trust, whether the conveyance contain words of inheritance or not.—*Ibid.*

ASSIGNOR AND ASSIGNEE.

See ACTION; ASSIGNMENT FOR THE BENEFIT OF CREDITORS.

Digitized by Google

ASSUMPSIT.

See TENANTS IN COMMON; WAIVER.

ATTACHMENT.

1. *Recovery not limited to amount sworn to be due.*—In an attachment suit, the plaintiff is not limited in his recovery by the sum sworn to be due in the affidavit on which the attachment was issued, if, by the proof, a greater amount is shown to be due.—*Pew v. Yoare*, 16.

2. *Dissolution of attachment: plea in abatement.*—The only mode by which a defendant in attachment can contest the truth of the facts stated in the affidavit upon which the attachment was issued, is by an application for a dissolution of the attachment.—*Bower v. Town*, 230.

3. Where, therefore, an attachment was issued on an affidavit which alleged that defendant had disposed of his property with intent to defraud his creditors, and the defendant interposed a plea in abatement that he had not disposed of his property with intent to defraud his creditors, it was held that the plea was properly stricken from the files.—*Ibid.*

ATTORNEY'S FEE IN MORTGAGE.

See MORTGAGE OF LANDS, 5.

BANKING POWERS.

See CORPORATIONS, 5.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. *Transfer of notes as conditional payment: obligation of the holder.*—Where one transfers notes to another, for property purchased, on an agreement that if the notes "are not cted, the said [purchaser] is to make up to the said [seller] the deficiency,"—the purchaser only receives the notes as conditional payment; and if they are not paid at maturity, he is under no obligation to bring suit upon them, but may immediately sue the purchaser for the amount. Per CHRISTIANCY J.—*Doige v. Stanton*, 408.

Digitized by Google

2. The effect of thus receiving notes as conditional payment is simply to postpone the payment of the demand on which they are received, until the securities fall due. Per CHRISTIANCY J. *Ibid.*

3. *Renewal note when a payment.*—A note which two parties had indorsed for a third being over due, the holder wrote the indorsers, requesting that a new note be sent in renewal. They sent one accordingly, made and indorsed by the same parties, payable at six months, and requested the return of the old note. No notice was taken of this request, nor were any steps taken to fix the liability of the indorsers on the new note; but after it fell due, suit was brought on the old note, and the new one was tendered to the parties on the trial, who refused to receive it. It was held, that the plaintiff, by retaining the new note, under the circumstances, had made it his own, and it operated as a payment of the old note.—*Sage v. Walker*, 325.

See EQUITY, 12, 18; SURETY.

BILL OF SALE.

See EVIDENCE, 24.

BONA FIDE PURCHASER.

1. *Of lands: notice of want of title.*—A person who, at the time of receiving a deed from another, knows him to have no title, or has notice of his want of title, cannot be a bona fide purchaser under the recording laws, whether the real owner of the title is known to him or not.—*Fitzhugh v. Barnard*, 104.

2. *Notice of what appears in chain of title.*—A grantee is chargeable with notice of whatever appears in the chain of title through which he claims.—*Ibid.*

3. A mortgage was given in 1832, and was foreclosed in 1835, and the premises conveyed to the mortgagees; but the deed was not recorded in the proper county. They soon after transferred the land by deed which was duly recorded. In 1856 the mortgagor made a deed of the same premises, subject to the mortgage, describing it as given "in 1830 or 1831." Held that this was sufficient notice to the grantee, not only of the mortgage, but that it was still unpaid; and after the lapse of twenty-four years, he had every reason to believe it had been foreclosed. The grantee, therefore, could not, in good faith, claim anything in opposition to the mortgage and the rights which had accrued under it.—*Ibid.*

Digitized by Google

4. *Who is.*—To constitute a bona fide purchaser there must be want of notice both at the time of the purchase, and at the time of payment: — (Warner v. Whittaker, 6 Mich. 133.)—*Blanchard v. Tyler*, 339.

5. Where, therefore, the defendant gave his note, not negotiable, for land of which complainant held a prior unrecorded deed, but was fully informed of complainant's equities before making payment of the note, it was held that he could not claim the protection of a bona fide purchaser.—*Ibid.*

6. *Who may claim rights of.*—The defense of a bona fide purchase can only be made by the purchaser himself, or by some one claiming through his purchase.—*Ibid.*

See ASSIGNMENTS FOR THE BENEFIT OF CREDITORS, 2; TITLE TO LAND; EQUITY, 10.

BOUNTY.

1. *Discrimination between volunteers.* — A man drafted into the United States service for nine months, but allowed to volunteer and to be mustered in for three years, is entitled to the State bounty offered to volunteers. While the bounty is being paid, no discrimination can be made among those who come within the terms of the offer. — *People v. Quarter Master General*, 191.

CASES AGREED UPON.

See PRACTICE IN CIRCUIT COURTS, 6, 7.

CASES IN MICHIGAN REPORTS, CITED IN THIS VOLUME.

Adams v. Hamell, 2 Doug. 278; *cited, p.* 379.
Attorney General v. Oakland Co. Bank, Wal. Ch. 90; *cited*, 71.
Bagg v. Jerome, 7 Mich. 145; *cited*, 136.
Berry v. Lowe, 10 Mich. 9; *cited*, 44, 45.
Bourke v. James, 4 Mich. 336; *cited*, 376.
Brown v. Bissell, 1 Doug. 273; *cited*, 389.
Brown v. Hazen, 11 Mich. 219; *cited*, 15.
Byrne v. Beeson, 1 Doug. 179; *cited*, 345.
Clark v. Moore, 8 Mich. 55; *cited*, 370.
Coon v. Fry, 6 Mich. 506; *cited*, 360.
Hall v. Nash, 10 Mich. 303; *cited*, 179.
Hall v. Soule, 11 Mich. 494; *cited*, 15.
Hibbard v. People, 4 Mich. 125; *cited*, 136.
Howard v. Moore, 2 Mich. 226; *cited*, 360.

Digitized by Google

Kellogg v. Putnam, 11 Mich. 344; *cited*, 430.
Martin v. McReynolds, 6 Mich. 70; *cited*, 350.
Matter of Lantis, 9 Mich. 324; *cited*, 114.
Mason v. Payne, Wal. Ch. 459; *cited*, 110.
Morey v. Forsyth, Wal. Ch. 465; *cited*, 350.
Moynahan v. Moore, 9 Mich. 9; *cited*, 278.
Newell v. Blair, 7 Mich. 103; *cited*, 123.
People v. Farwell, 4 Mich. 556; *cited*, 115.
People v. Jackson, 7 Mich. 432; *cited*, 406.
People v. Jones, 6 Mich. 176; *cited*, 405.
People v. Oakland Co. Bank, 1 Doug. 282; *cited*, 91.
Regents of University v. Board of Education of Detroit, 4 Mich. 213; *cited*, 164.
Rosenbury v. Angell, 6 Mich. 508; *cited*, 70.
Sallee v. Ireland, 9 Mich. 154; *cited*, 115.
Schwarz v. Sears, Wal. Ch. 19; *cited*, 328.
Sill v. Ketcham, Har. Ch. 423; *cited*, 350.
Streeter v. Paton, 7 Mich. 341; *cited*, 361.
Sweetzer v. Mead, 5 Mich. 107; *cited*, 157.
Thomas v. Dodge, 8 Mich. 51; *cited*, 13, 15, 414.
Trudo v. Anderson, 10 Mich. 357; *cited*, 123.
Wales v. Jones, 1 Mich. 254; *cited*, 21.
Ward v. Jewett, Wal. Ch. 45; *cited*, 323.
Warner v. Whittaker, 6 Mich. 133; *cited*, 342.

CASES MADE.

SETTLEMENT OF. See PRACTICE IN SUPREME COURT, 2, 3.

CERTIORARI AT COMMON LAW.

1. *Where there is a statutory remedy.* — The allowance of a writ of certiorari by a proper officer, to remove proceedings into the Supreme Court, is not conclusive upon that Court, and the writ may be dismissed if improvidently issued. — *Farrell v. Taylor*, 113.

2. The power of the Supreme Court to review the decisions of inferior tribunals on certiorari, is one to be sparingly exercised in cases where other adequate remedies can be had; and where a decision can be taken up by appeal, and on that appeal the jurisdictional questions, as well as those arising on the merits, can be fully disposed of, a certiorari should not be allowed, unless circumstances exist which show that a failure of justice will result from denying it. — *Ibid.*

Digitized by Google

3. *Misdirection.*—Certiorari to highway commissioners to review action taken by them in laying out a highway, and which, on appeal to the township board, had been confirmed. Held, that the writ should have been directed to the township board, instead of to the commissioners. — *People v. Highway Commissioners of Springwells*, 267.

CERTIORARI TO JUSTICE OF THE PEACE.

1. *Error not affecting the merits.* — Whether a Circuit Court should reverse the judgment of a justice of the peace on certiorari, because the judgment rendered exceeds the amount claimed in the *ad damnum* clause of the declaration, quere? — *Pew v. Yoare*, 16.

2. *Evidence not to be weighed.* — Where there is a conflict of evidence on a trial before a justice, and still evidence has been put in which covers the whole case, so far that, if believed, it would warrant a verdict, the Circuit Court, on certiorari, has no power to weigh the evidence, but must respect the finding, whether it is or is not such as would have been made by that Court. — (Berry v. Lowe, 10 Mich. 9.) — *Welch v. Bagg*, 41.

3. *Assignment of error.* — In an affidavit for a certiorari, an allegation of error, that there was no evidence to sustain the verdict and judgment, is too general and uncertain to be noticed. Per MANNING J., MARTIN CH. J. concurring. — *Ibid.*

CHALLENGE TO JUROR.

See PRACTICE IN CIRCUIT COURT, 2.

CHANCERY.

See EQUITY.

CITY OF DETROIT.

See DETROIT CITY.

COLLECTOR OF TAXES.

1. *Compensation of.* — Under the statutes in force in 1861 and 1862, the township treasurer had the right to retain, of his own authority, only two per cent. of the taxes of 1861 collected by him, for his fees, where neither the electors of the township, nor the supervisor, had fixed his compensation at a higher rate. — *Township of Texas v. Wager*, 89.

Digitized by Google

2. Whether the supervisor has the right to fix the compensation when the electors have neglected to do so, *quere*. — *Ibid.*

3. Where the electors did not determine what percentage should be added to the taxes for the collection expenses, and the supervisor added two and a half per cent., and, in his warrant for their collection, directed the treasurer to retain that amount for his fees, and the treasurer retained *four* per cent., paying over the remainder; it was held, that he was liable to the township for the amount which he had retained over two and a half per cent. — *Ibid.*

CONDITIONS.

See INSURANCE AGAINST FIRE, 3, 4, 9, 10, 11, 12, 18.

CONDITIONAL PAYMENT.

See BILLS OF EXCHANGE AND PROMISSORY NOTES, 1, 2.

CONFLICT OF LAWS.

See CONTRACT, 1.

CONSIDERATION.

See CONTRACT, 2, 8; EQUITY, 9.

CONSTITUTIONAL LAW.

1. *Tax titles.* — The provision in the tax law of 1858, authorizing proceedings before a circuit court commissioner to test the validity of tax titles, having been declared unconstitutional (*Waldby v. Callendar*, 8 *Mich.* 430), the further provision that a tax deed recorded two years shall be conclusive, falls with it. — *Quinlon v. Rogers*, 168.

2. *Irrevocable appropriation for educational purposes.* — The act of 1857 setting apart seventy-five per cent. of the proceeds of swamp lands for the primary school fund, does not constitute such an appropriation of the *lands* to educational purposes, as to place them, under section two of article thirteen of the Constitution, beyond legislative control. — *People v. Auditor General*, 171.

3. It was held, therefore, that the act of 1858, which reduced the proportion thus set apart, was not invalid for this reason; and that the primary school fund was not entitled to claim, under

Digitized by Google

said act of 1857, seventy-five per cent. of the proceeds of lands sold after the act of 1858, nor seventy-five per cent. of the value of lands appropriated by subsequent acts to the construction of roads. — *Ibid.*

CONTRACT.

1. *Locality of.* — Liquors had been sent from New York to Michigan, to be sold by local agents. Defendant called on the owners in New York, and made a bargain with them for the liquors at a specified price, he paying the freight, and having the excess of "outage," if any, over the original outage, allowed. The owners gave him a letter to their agents in Michigan, stating these facts, which he delivered, and after examining the liquors, took them, and gave his note for the price. It was held, that the sale must be regarded as made in Michigan, and subject to its laws. — *Myers v. Carr*, 63.

2. *Subscription for public purposes: Consideration.* — Where a subscription is made by which the signers promise to pay the several sums subscribed, for the purpose of erecting a building for educational purposes, and something has been done, or some liability or duty assumed, in reliance upon the subscription, in order to carry out the object, the promises are binding, and may be enforced, although no pecuniary advantage is to result to the promissors. — *Underwood v. Waldron*, 73.

3. But where, by its charter, a college was located at Spring Arbor, and a subscription was entered into for the purpose of erecting a college building therefor at Hillsdale, and it did not appear, by the subscription or otherwise, that it was designed as an inducement to the college to endeavor to obtain legislative authority to remove to Hillsdale, and it could not be lawfully removed without such authority, it was held, that the subscription, being for a purpose not authorized by law, was invalid. — *Ibid.*

4. *Sale on Sunday.* — A contract of sale made on Sunday is void; and the vendor may, on a subsequent day, tender back the purchase price, and recover his property by replevin if it is not restored on demand. — *Tucker v. Mowrey*, 378.

Admissions by: See EVIDENCE, 3, 4.
Of Insurance: See INSURANCE AGAINST FIRE.
Of Guaranty: See GUARANTY.
Specific Performance of: See SPECIFIC PERFORMANCE.
Action on assigned: See ACTION.
For sale of Liquors: See PROHIBITORY LIQUOR LAW.

Digitized by Google

CONVERSION.

See ASSIGNMENTS FOR THE BENEFIT OF CREDITORS, 7, 8, 9; TENANTS IN COMMON.

CONVEYANCE.

1. *Deed of lands: presumption as to time of delivery.* — Where a deed is acknowledged on a day subsequent to its date, and there is no proof of delivery prior to the acknowledgment, it must be presumed to have been delivered afterwards; such being the usual course and practice in reference to the delivery of deeds and other instruments intended for record. — *Blanchard v. Tyler*, 339.

2. *In trust*, may convey a fee without the word "heirs." — *Angell v. Rosenbury*, 241.

See TITLE TO LAND.

CORPORATION.

1. *Power of corporations to purchase and convey lands.* — A corporation having power to purchase and hold real estate for the purposes of their incorporation, entered into an executory contract of purchase, by which they were to make payment at any time within one hundred years, paying taxes and interest in the mean time; and no right to possession was given until payment was made. Suit being brought for interest upon the contract, and neither the declaration nor the contract showing the purpose of the purchase, it was objected that it could not be for the legitimate use of the incorporation. But it was held that the contract was as consistent with that purpose as any other, and that the Court was bound to infer, until the contrary was alleged or proved, that such was the object of the purchase. — *Regents of University v. Detroit Young Men's Society*, 138.

2. The Regents of the University of Michigan have power to take, hold and convey real estate, for any purpose tending to promote the interests of the University, to increase its funds, or otherwise to further the great public objects for which the corporation was created. — *Ibid.*

3. Where suit was brought by the Regents to recover the purchase price of lands sold by them, and the declaration alleged their ownership, but did not show the nature of their title, nor how acquired, and it was demurred to on the ground that the Regents

Digitized by Google

had no power to make a sale of lands without special legislative authority: held, that as it was legally possible for the Regents, in some modes and for some purposes, to be vested with the title to lands with power to convey the same, the judgment on demurrer must be for the plaintiffs. — *Ibid.*

4. *Corporation confined to the purposes for which it was created.* — Where by its charter a corporation is confined to one kind of business, it can not lawfully engage in enterprises foreign to that business. A railroad company whose purposes are strictly confined to the completion and maintaining of a railroad, can not lawfully engage in banking. — *People v. River Raisin and Lake Erie R. R. Co.* 389.

5. *Banking powers, what are.* — The issue of paper designed to circulate, in the form and similitude of bank bills, is an act of banking. — *Ibid.*

6. *Forfeiture of franchise by nonfeasance.* — The statute, *Comp. L.* § 4854 which provides that "whenever an incorporated company shall have remained insolvent for one whole year," &c., "it shall be deemed to have surrendered the rights, privileges and franchises granted" by its act of incorporation, "and shall be adjudged to be dissolved," is applicable to corporations chartered before the statute was passed. — *People v. Bank of Pontiac*, 527.

7. The forfeiture must be declared in a judicial proceeding; and until the State chooses to insist upon the forfeiture, no one else has the right to question the existence of the corporation collaterally. — *Ibid.*

8. But when a corporation has been guilty of such a breach of the condition of its existence or continuance as to authorize a forfeiture of its charter, it can not legally atone for such misconduct, and avoid the forfeiture, by subsequent good behavior. — *Ibid.*

9. Where a bank became insolvent and suspended operations in 1840, and did not resume again until 1864, it was held that the State had not, by laches, lost its right to insist upon the forfeiture under the statute above quoted. The State shows sufficient diligence (if any is required) if it institutes proceedings and claims the forfeiture within a reasonable time after a resumption of business, or an attempt to resume, on the part of the corporation. — *Ibid.*

10. Only fourteen months of the chartered existence of the bank remaining unexpired, when it resumed business after a suspension of twenty-four years, the Court, if it has a discretion so to do

Digitized by Google

under the statute, will not impose a fine instead of adjudging a forfeiture of the charter. — *Ibid.*

See CONTRACT, 8; DETROIT & ERIN PLANK ROAD COMPANY.

COSTS.

See EQUITY, 22, 53; EXECUTORS AND ADMINISTRATORS, 3; HIGHWAYS, 3.

COVENANT.

See ELECTION OF REMEDIES.

CRIMINAL LAW.

1. *Omission of matter of form in indictment.* — Under the statute of 1855, relative to indictments, if an indictment or information contains direct and unequivocal averments of such facts — not being mere evidence — as lead immediately and of necessity to a single and inevitable conclusion, the omission to draw that conclusion will not vitiate the pleading. — *Evans v. People*, 27.

2. An information for murder was in the full common law form of indictments, except that in the conclusion, where it was averred that the respondent "did kill and murder," the name of the person killed was omitted. The respondent was convicted of manslaughter, and it was held that, under the statute, the information was sufficient to sustain the conviction. — *Ibid.*

DAMAGES.

1. *Against vendor for refusal to complete sale.* — Plaintiffs bought hogs of defendants, paying ten dollars down, and were to pay the balance on delivery. Defendants refused to deliver, and plaintiffs sued. The market value of the hogs, at the time of the refusal, was no more than plaintiffs were to pay. Plaintiffs on the trial claimed to recover a loss which they had sustained by reason of not having the hogs to ship with others then on hand, upon cars hired by them for the purpose after the purchase was made; but it was held that, as the contract of sale was not made with reference to any such extraordinary liability, the plaintiffs could only recover the ten dollars paid and interest thereon. — *Cuddy v. Major*, 368.

2. To create such extraordinary liability, there must, in every case, be something in the terms of the contract, read in the light of surrounding circumstances, which shows an intention on the part

Digitized by Google

of the vendor to assume an enlarged engagement, a wider responsibility than is assumed by the vendor in ordinary contracts for the sale and delivery of merchandise. (Clark v. Moore, 8 Mich. 55.) — *Ibid.*

DEBTOR AND CREDITOR.

See ASSIGNMENT FOR THE BENEFIT OF CREDITORS; EQUITY, 27, 28; JUDGMENTS AND EXECUTION

DEDICATION.

See WAYS.

DEED.

See CONVEYANCES.

DELIVERY.

See CONVEYANCES.

DEMAND.

See PLEADINGS, 9.

DESCENT OF PROPERTY.

See EXECUTORS AND ADMINISTRATORS.

DETROIT CITY.

1. *Liability for public works.* — Under the charter of Detroit (of 1857) the city corporation has no power to make itself responsible for the price of any public work; and such work can only be paid for by funds actually in the hands of the city treasurer, provided for the specific purpose. — *Goodrich v. City of Detroit*, 279.

DETROIT AND ERIN PLANK ROAD COMPANY.

1. *Power of plank road company to change location of gates.* — A plank road company has general power to change the location of its gates, and to erect new ones, unless specially restricted. — *City of Detroit v. Detroit & Erin Plank Road Co.*, 333.

2. *Exclusion of gates from city limits — subsequent extension of limits.* — A plank road company occupying for their purposes a roa

Digitized by Google

leading from the city of Detroit, procured an amendment to their charter, by which they were "empowered to extend their road on Gratiot street to Randolph street in the city of Detroit: *provided*, that no toll gate shall be erected or maintained within the limits of said city by said company." Subsequently the city limits were extended by statute so as to embrace a portion of the original road upon which a gate had before been erected. It was held, that the amendatory act did not restrict the original powers of the company to erect and maintain a gate on any portion of the road then outside the city limits, but only prohibited any gate upon the extension of the road which was authorized by the amendatory act. — *Ibid.*

DISCRETION, MATTERS OF.

See ERROR, 6, 7.

DISSOLUTION OF ATTACHMENTS.

See ATTACHMENTS, 2, 3.

DIVORCE.

See ALIMONY.

DOWER.

See SPECIFIC PERFORMANCE, 4.

DRAINING OF SWAMPS &c.

1. *Drainage laws of* 1857 *and* 1858: *void proceedings.* — Proceedings being taken under the act of 1857 "to provide for the draining of swamps, marshes and other low lands," as amended in 1859, a venire was issued by the chairman of the drain commissioners without any application being made to the commissioners by resident freeholders. As the amendatory act plainly requires this, the proceedings were held void. — *Palmer v. Eich*, 414.

2. *Drainage law of* 1859: *saving clause.* — In the act of 1859 the saving of "any engagement, contract or undertaking heretofore entered into by the commissioners," does not keep alive any proceedings commenced under the old law, in any incipient stage, where no vested rights have accrued. — *Ibid.*

3. *Drainage law of* 1859: *deeds on sales for taxes.* — Where lands are sold for taxes which include taxes assessed under the drainage

Digitized by Google

law of 1859, the deeds given by the Auditor General are prima facie evidence of regular proceedings in the assessment and subsequent steps to a sale. — *Ibid.*

EJECTMENT.

By heir: See EXECUTORS AND ADMINISTRATORS, 1, 2.

ELECTION OF REMEDIES.

1. A purchaser to whom land has been conveyed with a covenant against incumbrances, and who has given back a mortgage for purchase money, is not confined to his remedy upon the covenant, but is entitled, especially where the covenantor is insolvent, to have existing incumbrances deducted from his mortgage. — *Detroit & Milwaukee Railroad Co. v. Griggs*, 45.

ELECTIONS.

1. *Election required by law to be held: neglect to give notice.* — Where a city charter requires a vacancy in a city office to be filled at the next annual election, and directs the city clerk to give notice of the election, and of the offices to be filled, and the notice actually given by him takes no notice of the vacancy this default of the clerk does not invalidate the election for this vacancy. — *People v. Hartwell*, 508.

2. *Statute, when directory.* — The statute requiring this notice to be given is directory merely. — *Ibid.*

EQUITY.

1. *General Principles.*

1. *Power of equity to create a lien on lands: remedy at law.*—A court of equity can not create a lien on real estate to secure a personal debt not contracted on its credit, and not charged upon it by agreement.—*Bennett v. Nichols*, 22.

2. Complainant's intestate had leased premises for the purpose of erecting a steam saw mill thereon, had placed upon them a frame for the building, ready for erection, and had contracted and partly paid for an engine for the same. After his death, the land was sold by his lessor, and the purchaser, together with the contractor for the engine, put up the frame, and completed and commenced operating the mill. Complainant, as administrator, filed his bill against them to compel payment of

Digitized by Google

the value of the mill frame, and of the moneys paid towards the engine, and to have the amount declared a lien on the premises. It was held that his claims were not of equitable jurisdiction, and that his remedy was at law.—*Ibid.*

3. *Bill to quiet title: Complainant's possession.*—A bill was filed to quiet complainant's title to land bounded on a river, of the whole of which he was in possession except a small portion—being a boom, embracing the bed of the stream and a foot path on the bank. His title to the whole was the same, and was undoubted. Held, that a decree quieting his title to the whole of the land was properly granted.—*Fitzhugh v. Barnard*, 104.

4. But held, also, that the Court could not go further, and take an account of the rents and profits of the boom while occupied by the defendants as wrong doers.—*Ibid.*

5. Bill to quiet title to land. It appeared in evidence that a person who was in possession as tenant of a third party, had, with his landlord's assent, attorned to two persons who were not shown to have any interest in the land, and one of whom afterwards, as agent for the complainant, executed a lease of the whole land to the tenant. It was held that this lease would estop the person signing it as complainant's agent from setting up any claim as against complainant, and that the possession of complainant by his tenant under it, ostensibly of the whole, and rightful at least for one half, was sufficient to enable complainant to maintain a bill, under the statute, to quiet his title to the land as against a third person claiming it.—*Blanchard v. Tyler*, 339.

6. *Removing cloud upon title: injunction to stay tax sale.*—Where an illegal tax is assessed upon lands, and by statute the deed given on a sale of the land therefor would be prima facie evidence of regular proceedings in the assessment and subsequent steps to a sale, such sale would operate to create a cloud upon complainant's title, notwithstanding the illegality must appear on the face of the proceedings: and the owner may therefore maintain a bill in equity to stay the tax sale.—*Palmer v. Rich*, 414

7. *Averment as to amount in controversy.*—Bill in equity to restrain a sale of lands for taxes. The bill averred the tax to be "about one hundred and fifty dollars." Held a sufficient averment that the tax was more than one hundred dollars.—*Ibid.*

8. *Parol evidence to divest a title to land.*—To warrant a court of equity in divesting a title to land, on parol evidence that an unrecorded deed given therefor was subsequently, by agreement between the parties, surrendered by the grantee to be cancelled,

Digitized by Google

the preponderance of evidence should be clear, and the evidence should be so convincing as to leave no reasonable doubt upon the mind.—*Hunter v. Hopkins*, 227.

9. *Correction of deed: failure of consideration.* — A mistake in description occurred in a deed given on behalf of the United States, of a lot in Detroit, in exchange for other lands. The city was afterwards, by act of Congress, made the donee of the undisposed of lands on the city plan. To a bill filed against the city to correct the mistake, it is not a valid defense that the title to the land conveyed to the United States in exchange subsequently failed. — *Farmers & Mechanics' Bank v. City of Detroit*, 445.

10. *Bona fide purchaser.* — Nor can the city, as donee of the United States, nor persons who took a conveyance from the city with notice, claim the protection of a bona fide purchaser against such correction. — *Ibid.*

11. *Laches in applying for correction of mistake.* — A mistake occurred in the description of lands in a deed given in 1816. The grantee took possession of the land intended to be conveyed, and he and his grantees retained it until 1848, when one who had succeeded to the rights of the grantor went into possession. Bill was filed in 1851 to correct the mistake. Held, that the remedy was not lost by laches. — *Ibid.*

12. *Defense precluded by judgment.* — Where one is induced to become indorser of a note by the statements of the payee that it is mere matter of form, and he will not be troubled about it, and afterwards suit is brought on the note, and he makes no defense, and judgment is obtained, he is thereafter precluded from claiming that the judgment is not binding upon him. — *Roberts v. Miles*, 297.

13. *Indorser discharged by conduct of holder.* — But where, after the judgment, statements to a similar effect were made, under such circumstances as to justify the indorser in believing and acting upon them, and in supposing he was not liable and he was thereby induced to abstain from securing himself when he might easily have done so, until the maker became insolvent, and an execution was then levied upon his property, it was held that he was entitled to a perpetual injunction. — *Ibid.*

14. *Former suit when not a bar.* — Bill to foreclose a mortgage given for the purchase price of lands, which were conveyed to the mortgagor by deed covenating against incumbrances. The mortgagor defended, claiming to have the amount of two mortgages which were liens on the premises when conveyed to him, but

Digitized by Google

which he had not yet paid, deducted. The deduction not being allowed, the mortgagor, after decree, paid off the prior mortgages, and then filed his bill to have the sums so paid set off and deducted from the amount of the decree. It was held, that the bill might be maintained, and that the adjudication in the first suit was not a bar to it. — *Detroit & Milwaukee Railroad Co. v. Griggs*, 45.

15. *Fraudulent grantee to hold in trust for persons equitably entitled.* — See this principle applied in the case of *Adams v. Bradley*, 346.

16. *Partition between tenants in common.* — Where the owner of lands conveyed an undivided moiety to another, for a sum of money less than its value, to be paid from the proceeds of sales to be made thereof, and secured by mortgage on the lands, and a part of the consideration consisted in the services of the purchaser in taking charge of and selling the joint property under a contract between them, and a principal part of the seller's security for the purchase price and for the efficiency and fidelity of the purchaser in the management and sale of the property, consisted in the control he would have over the sales of the purchaser's interest, it was held that so long as the seller was not guilty of refusal to perform his part of the contract, or of any default which would relieve the purchaser from the obligation to perform, or prevent his performance, the latter was not entitled to partition. — *Avery v. Payne*, 540.

17. Mortgages executed by the seller on his undivided half, not alleged or shown to have interfered with sales, or otherwise to have operated to the prejudice of the purchaser, will constitute no reason for partition. — *Ibid.*

2 Pleadings and Practice.

18. *Defect of jurisdiction not waived by answer.* — Where a complainant in equity seeks relief not of an equitable character, the objection can not be waived by answer, but may be taken at any stage of the cause. — *Bennett v. Nichols*, 22.

19. *Foreclosure suit: multiplicity of issues.* — Three persons who had held land in partnership sold it, and gave separate conveyances to the purchaser, who, in pursuance of an arrangement to that effect, gave back a mortgage for the purchase price to one of them. The purchaser afterwards bought up a mortgage given by one, on an undivided one-third of the land, and sought to make a set off of this in a suit to foreclose his own mortgage. But the set off was refused, the Court holding that claims under this mortgage could be better litigated in a separate suit; and

Digitized by Google

the foreclosure decree was so framed as to leave this prior mortgage untouched. — *Adams v. Bradley*, 846.

20. *Parties to suit in equity: cestui que trust.* — In a suit by a trustee to reduce the trust fund into his possession, the cestui que trust need not be made a party. (Sill v. Ketcham, Har. Ch. 423; Morey v. Forsyth, Wal. Ch. 465; Martin v. McReynolds, 6 Mich. 70.) — *Ibid.*

21. *Parties to foreclosure.* — The fraudulent grantee of a title which is equitably subject to a mortgage, is a proper party to a suit to foreclose the mortgage. — *Adams v. Bradley*, 846.

22. *Parties to foreclosures: costs.* — A defendant in a suit to foreclose a mortgage on two parcels of land, answered, claiming one of them by paramount title, and disclaiming as to the other; and as to the last a decree was taken. It was held, that the bill should have been dismissed as to this defendant, with costs; as he was under the necessity of appearing and answering to protect his interest in the parcel claimed by him. — *Gregory v. Stanton*, 61.

23. *Parties to foreclosure.* — The description of premises in a mortgage was erroneous in one particular, and a person was made defendant in a suit to foreclose it as a subsequent purchaser or incumbrancer, who owned land which might be interfered with by the erroneous description, but who had never been incumbrancer or owner of the mortgaged premises, as identified by the proofs. It was held that he was improperly made a party, and the bill as to him was dismissed. — *Ramsdell v. Eaton*, 117.

24. *Abbreviated names: allegation of identity.* — A mortgage was given by "Alexander Eaton, Junior" to "O. P. Ramsdell." A bill was filed to foreclose it, by *Orrin* P. Ramsdell against Alexander Eaton. The bill was in the usual form, but contained no allegation that the parties to the suit were identical with the parties to the mortgage. Eaton suffered the bill to be taken as confessed; but a successful defense being interposed by another defendant who was improperly made a party, the Court dismissed the bill as to all, for want of such allegation of identity. Held that this was erroneous. The question of identity was open to proof, if disputed, and the *pro confesso* admitted it as against the mortgagor. — *I bid.*

25. *Bill to correct mistake: parties.* — Where the title of complainant was acquired without warranty, the grantee in a conveyance through which he claims is not a necessary party to a bill to correct a mistake in such conveyance. — *Farmers and Mechanics Bank v. City of Detroit*, 445.

Digitized by Google

26. *Practice in foreclosure suits: Disregarding commissioner's report.*— Bill for the foreclosure of a mortgage. An answer being filed denying that any thing was due, the case was referred to a circuit court commissioner, whose report showed nothing due when suit was commenced. This report was not excepted to, and it was held that the defendant had a right to rely upon it, and that the Court could not inspect the documents which were before the commissioner, or take evidence to test the correctness of the commissioner's conclusions.— *Thorne v. Hilliker*, 215.

27. *Parties to judgment creditor's bill.* — Where the judgment creditor had assigned the demand upon which the judgment was rendered, to secure a debt of equal amount, it was held that the assignee alone, or those succeeding to his rights, could bring suit in equity to enforce the judgment.— *Andrews v. Kibbee*, 94.

28. The fact that, in such a case, one of the defendants has become the assignee, will not enable the complainant to sustain his bill, which avers the ownership to be in himself; since the testimony showing the assignment would also show that complainant had no right of action such as he set out in his bill — *Ibid.*

29. *Bill to restrain sale for taxes: parties.* — To a bill filed against a county treasurer to restrain a sale for taxes assessed under the drainage law of 1859, and to annul the tax, the contractors for making the drains are not necessary parties.— *Palmer v. Rich*, 414.

30. But the Auditor General is a necessary party: as in all proceedings to collect the taxes after they are returned to his office, or to sell the lands to enforce them, the county treasurer is only the agent of the Auditor General, and does not act as a mere county officer.— *Ibid.*

31. *Cross bill, its nature and purpose.* — A cross bill for relief is always designed for the purpose of enabling a defendant to avail himself of some defense which can only be made complete by granting him some affirmative relief against complainant or against some co-defendant. It must be strictly confined to the matters involved in the original cause. Where a bill introduces other distinct matters, it is an original bill, and the suits are separate and distinct.— *Andrews v. Kibbee*, 94.

32. A judgment creditor filed his bill in equity to enforce the payment of the judgment, making one a defendant who was alleged to be indebted to, and also a fraudulent grantee of, the judgment debtor. This defendant afterwards filed his bill against the complainant, claiming to have become the owner of the debt for which the judgment was rendered, and of a collateral mortgage

Digitized by Google

given to secure it, and praying to have his title to these securities established. The judgment debtor (who was the mortgagor in the collateral mortgage) and the holder of a prior mortgage were also made parties, and the bill prayed leave to redeem from the prior mortgage, and the foreclosure of the other. Held, that this was an *original*, and not a *cross* bill.— *Ibid.*

83. *Effect of answer as evidence: examination of defendant as a witness.*— Where an answer in chancery is called for on oath, and the defendant of his own knowledge fully and fairly negatives any allegation of the bill, complainant can have no relief depending upon that allegation, unless the answer is overcome by more than the equally full testimony of one witness. — *Roberts v. Miles*, 297.

84. But this rule amounts simply to this: that there can be no decree in favor of complainant unless the evidence preponderates in his favor; and that where answer and opposing witness are equally fair and explicit, there can be no such preponderance. — *Ibid.*

85. If defendant, after having thus answered, is called upon the stand as a witness under the statute of 1861 (p. 168), and furnishes the means of destroying his own answer, and corroborating complainant's case, his testimony on the oral examination and cross-examination is preferable to his answer. — *Ibid.*

86. Since said statute the defendant's answer on oath, responsive to the bill, is to be regarded as of the same force only which it would have were it the defendant's deposition as a witness — *Ibid.*

87. *Defendant concluded by statements in his answer.* — Bill to redeem lands from a deed absolute in form, but alleged to have been given to secure the payment of indebtedness from complainant to defendant, the grantee. Defendant answered under oath — though oath was waived — averring that at the date of the deed, complainant was indebted to him in the sum of $30,000, and that the deed was made to him in satisfaction of this demand, and not as security. On a hearing on pleadings and proofs, the deed was adjudged to be a mortgage, and a reference was ordered to a commissioner to take an account between the parties, and report the amount due. It was held, that defendant was precluded by his answer from showing on the reference that a larger sum than the $30,000 was due him from complainant at the date of the deed. — *Emerson v. Atwater*, 314.

88. If the amount of the indebtedness was incorrectly stated in the answer by mistake, defendant should have applied to the Court,

Digitized by Google

showing how it occurred, and asking leave to amend the answer in that particular. — *Ibid.*

39. *When answer conclusive on other defendants.* — The assignee of said grantee interposed the plea of a bona fide purchase without notice, which plea, on the hearing, was found untrue. It was held, that as [he was then undefended except by the answer of his grantor, and was entitled to all the benefits of that, so, also, he was concluded by its statements to the same extent as his grantor himself. He, also, was therefore concluded from showing that more than the $30,000 was due. — *Ibid.*

40. *Adjusting accounts: annual rests: interest.* — Annual rests directed in adjusting accounts between mortgagor and mortgagee, and interest computed on each item of the account, where this course was found to be warranted by the practice of the parties. — *Ibid.*

41. *Exceptions to the commissioner's report* are proper only where the commissioner has come to an erroneous conclusion of law or fact on the evidence before him, touching the reference. — *Ibid.*

42. If a commissioner errs in not calling parties before him, to produce books, papers, &c., the proper remedy of the party deeming himself aggrieved, is to apply to the Court for an order requiring him to do so. The error can not be corrected by excepting to the report. — *Ibid.*

43. An exception that "commissioner has credited to complainant the sum of $9,210.37 for amount defendant has received on sales of lots, and interest thereon to May 5, 1860, whereas he should have credited a less sum," is too indefinite and uncertain to admit the raising under it of an objection that the commissioner did not allow to defendant a sum paid to a third person to perfect the title to the lands. — *Ibid.*

44. *Form of decree for redemption from absolute deed.*—Where, on bill to redeem, a deed absolute in form is adjudged to be a mortgage, and the mortgagee had, before bill filed, conveyed to one of the other defendants, the decree should direct the amount due to be paid to the assignee, instead of the mortgagee.—*Ibid.*

45. It is proper, in such a case, to direct a sale of the premises to satisfy the amount due, in default of payment by the time fixed, instead of decreeing a strict foreclosure.—*Ibid.*

46. *Motion to set aside decree.* — On a motion to set aside a decree for irregularity the affidavits should show that the party is injured by the irregularity.—*Michigan Insurance Co. v. Whittemore*, 427.

Digitized by Google

47. *Foreclosure: when reference unnecessary as to defendants defaulted.*—Where, in a foreclosure case, the bill is taken as confessed by a part of the defendants, the evidence taken on the issue as to the others is evidence as to those who are defaulted; and a reference to take separate proofs as to them, covering the same ground, is unnecessary.—*Ibid.*

48. *Notice in chancery, when not necessary.* — Where such a reference was had without necessity, it was held that notice of the reference to the defendants who had appeared was not requisite. (Kellogg v. Putnam, 11 Mich. 344.)—*Ibid.*

49. *Setting aside sale in chancery: laches.*—A sale under a decree in chancery in a foreclosure case will not be set aside on the ground of surprise and inadequate consideration, after a long unexcused delay, which has continued until an execution has been issued for a deficiency, and a sale made, under which third persons have acquired vested interests, and complainant has made payments to redeem from former sales. — *Leonard v. Taylor*, 398.

50. *Petition to set aside sale: offer to increase bid.*—Petition being filed to set aside a sale under a decree in chancery on the ground of inadequate consideration, and the complainant — who was the purchaser — not having sought to take advantage of petitioner's embarrassments, and not appearing to have been at any time unwilling to receive the amount due upon the decree and the amount paid to redeem from prior sales, and to transfer to petitioner all rights acquired by the purchase, it was held that, under these circumstances, at least, it was a fatal objection to the petition that it did not offer to pay anything to complainant, or to increase the bid in case a re-sale was ordered.—*Ibid.*

51. *Leave to amend at the hearing.*—An objection for the want of a necessary party in chancery was not made until the hearing. The bill made out a case on all other points, and the Court granted decree for complainant as prayed. On appeal, the Supreme Court, in reversing the decree for want of parties, granted leave to amend, and allowed an injunction, which had been decreed, to stand until the further order of the Court below, to which the case was remitted.—*Palmer v. Rich*, 414.

52. *Proof of case not stated in pleadings.*—Petition to revise and alter a decree for alimony. Facts proved on a reference under such a petition, which are not made a ground for relief in the petition, can not be noticed by the Court.—*Perkins v. Perkins*, 456.

53. *Costs.*—Bill and Cross bill.—In the Court of Chancery the latter was

Digitized by Google

dismissed and the former sustained. On appeal to the Supreme Court, both bills were dismissed, but, under the circumstances, each party left to pay his own costs in the Court below.—*Avery v. Payne*, 540.

ERROR.

1. *Inconsistent instructions to the jury.* — A judgment will not be reversed because inconsistent instructions were given to the jury, if those adverse to the plaintiff in error were all correct.—*Niagara Fire Insurance Co. v. DeGraff*, 124.

2. *Verdict against evidence.*—The question whether the jury did not find against evidence or perversely, cannot be considered on writ of error.—*Ibid.*

3. *Request for instructions to the jury how construed.* — On error the Supreme Court must construe a request for instructions to the jury as it must have been understood by the Court and jury had it been given. It must therefore be construed in reference to the evidence in the case upon the subject to which it alludes. —*Angell v. Rosenbury*, 241.

4. *New trial refused: error can not be assigned.* — Error can not be assigned on the refusal of the Circuit Court to grant a motion for a new trial. (Bourke v. James, 4 Mich. 336.) — *Cuddy v. Major*, 368.

5. *Party not injured can not complain of error.*—A plaintiff in replevin can not complain that the Court awarded nominal damages to him when the jury gave none; the error, if any, being in his favor.—*Sleight v. Henning*, 371.

6. *Review of matters of discretion.*—Where the Circuit Court has power to vacate judgments, it is a discretionary power; and its action can not be reviewed by the Supreme Court.—*Van Rensselaer v. Whiting*, 449.

7. If the Circuit Court, on appeal from an order of the Probate Court refusing to admit a will to probate, can allow part of the proponents to renounce and be discharged, in order to become witnesses, the power to do so is discretionary, and a refusal can not be reviewed on error.—*Beaubien v. Cicotte*, 459.

8. *Curing the error where evidence has been erroneously excluded.*—Where a question put by a party to his own witness is erroneously overruled, the error is not cured by his being allowed afterwards to put the same question to the witness of the other party on cross-examination.—*Flanigan v. Lampman*, 58.

Digitized by Google

9. Action on a promissory note. Defense, set off and payment. The defendant offered evidence of a payment of five dollars, which was excluded by the Court, on the ground that the item was not mentioned in the bill of particulars of set off. Plaintiff having recovered judgment, was allowed by the Court to remit five dollars of the amount, with a view to curing the error. It was held that the error was not cured. By rejecting this evidence, the Court in effect denied the defendant the right to prove any item of payment without notice; and the Court, therefore, can not say what other payments may have been excluded by this ruling.—*Olcott v. Hanson*, 452.

ESTATES OF DECEASED PERSONS.

See EXECUTORS AND ADMINISTRATORS.

ESTOPPEL.

See EVIDENCE, 2.

EVIDENCE.

1. *Its general purpose.*—In all testimony the object of the law is, to enable the jury to know all that the witness knows which is pertinent to the issue; and every rule of evidence is designed to secure this end.—*Beaubien v. Cicotte*, 459.

2. *Invalid agreement not an estoppel.*—A paper signed by a judgment debtor, and delivered to the attorney for his creditors, after execution issued on the judgment has been levied, by which he agrees to settle the judgment, by paying a certain amount in notes satisfactory to the attorney, or, in default thereof, to turn out the property levied upon in payment, is neither valid as a contract, nor can it operate by way of estoppel against the debtor, where it appears that the creditors had given the attorney no authority to receive such a paper, or to compromise the action in any manner.—*Hickey v. Hinsdale*, 99.

3. *Admissions by invalid agreement.*—But, in an action of replevin brought by the debtor, for the property levied upon, it was held, that said paper was admissible in evidence against him, as a parol admission of the facts recited in it, and open to explanation and contradiction as such.—*Ibid.*

4. *Opinions of witnesses who are not experts.*—The case reconsidered in which the opinions of witnesses who are not experts may be given in evidence.—*Evans v. People*, 27; *Beaubien v. Cicotte*, 459.

Digitized by Google

5. The case being such, that the exact nature, as well as the existence, of a particular epidemic in a certain locality was in controversy, a question was put to a witness (not an expert) as to the existence of the epidemic in that locality. The question was objected to, and the objection overruled. The witness, in reply, denied the existence of any sickness whatever in that locality. It was held that the difference between health and any sickness whatever could not be regarded as open only to medical science, and that the answer of the witness was not incompetent. —*Evans v. People*, 27.

6. There is nothing in the nature of inquiries concerning mental capacity which requires juries to be informed, of necessity, by other than ordinary witnesses. — *Beaubien v. Cicotte*, 459.

7. Therefore, in an inquiry concerning mental capacity to perform a certain act, witnesses who are not experts may testify to their opinions upon the question in controversy, based upon their own observations. — *Ibid.*

8. It is proper to put the question to the witness in such a way as to call for his opinion upon capacity with reference, as near as may be, to the very act or kind of act in dispute. — *Ibid.*

9. Accordingly, on a question of capacity to execute a will, it was held proper to ask a witness who had seen and conversed with the testator near the time of executing the instrument, whether, from the conversation then had with him, and from what he then saw of him, he was capable of comprehending or understanding a document of any considerable length, if it had been read to him.

Also, what capacity the testator had, at the time the witness saw him, to understand business matters.

Also, whether, in the opinion of the witness, the testator was, at the time, capable of holding a conversation like one testified by another witness to have taken place. — *Ibid.*

10. *Evidence on probate of will: alleged fraud: res gestae.* — Where a will is contested on the ground of fraud or undue influence, a very broad inquiry is permitted into the whole chain of circumstances attending its preparation: and the transaction must be deemed to embrace all the immediate preliminaries. — *Ibid.*

11. Where the instructions for executing a will contemplated that the attending physician should be sent for to attest it, the *res gestae* necessarily embrace this as one of the steps actually taken; and what message was sent, or received and acted upon, is there-

Digitized by Google

fore admissible, as a circumstance which may have weight or not, as made significant or not by other proofs. — *Ibid.*

12. *Inquiry as to conflicting statements of witness.* — The testimony of the attending witness, as to the nature of the message sent, being somewhat contradictory, it was held to be proper, on cross-examination, to call his attention to his testimony on a former trial, and to ask him if he did not then state that a particular message was brought. — *Ibid.*

13. *Statements of witness impeaching his candor.* — A question to a witness whether he did not, on a former trial, testify that he said yes and no, and played good Lord and good devil, because he did not know into whose hands he might fall, is admissible, as going directly to his fairness and candor. — *Ibid.*

14. *Limit to re-examination.* — A witness on his cross-examination testified, that, some years before, he had a conversation with the deceased; but he gave no part of the conversation, and it did not appear to have had any bearing upon the controversy. It was held not competent for the opposite party, on re-examination, to inquire what was said by the deceased on that occasion. — *Ibid.*

15. *Refreshing witness's recollection.* — In order to refresh the recollection of a witness, his attention may be called to his evidence on a former trial, and counsel's minutes of the former testimony read for the purpose. — *Ibid.*

16. *Will: undue influence: declarations of testator.* — A will being assailed for fraud and undue influence on the part of the wife, statements of the testator that he regretted his marriage, that he was not master at home, that he was afraid of his wife, and was compelled to submit to her demands, or otherwise there would be trouble in the house, are admissible evidence. — *Ibid.*

17. *Impeachment of witness by contradictory statements.* — Where a subscribing witness to a will testifies to its due execution by a competent testator, evidence of his statement, on another occasion, that it was not worth the snap of his fingers, is competent by way of impeachment. — *Ibid.*

18. *Will: undue influence: proof of terms on which the family lived.* — A will which disinherited the testator's relatives in favor of his wife and her relatives, being assailed for undue influence and want of capacity, it was held competent to prove the wife's abuse of the husband's relatives, and her quarrel with him about a former will by which he had made provision for them. A

Digitized by Google

wide range of inquiry into the family relations, and the terms upon which they lived, is allowable in these cases. — *Ibid.*

19. Evidence that the testator made no complaint of any importunities on the part of his relatives, is also admissible in such case, where it appears that the wife had made charges to him of their rapacity. — *Ibid.*

20. Evidence of former wills, and of other pecuniary arrangements for the wife, is also admissible, as having a bearing upon the question whether the testator has understandingly, and of his own free will, changed his settled views. — *Ibid.*

21. *Admissibility of declarations.* — Replevin for certain barrels of apples. Defendant claimed a part of them. It became a question whether these could be distinguished from the rest; and the question of title was also material. On the trial, the defendant, being a witness, was asked whether, at the time the writ was served, his agent pointed out to the officer the apples he claimed to have bought for defendant; to which question he replied; "He did: he pointed out two rows, and said, 'these are the apples which [defendant] purchased yesterday.'" Held, that both question and answer were competent, not to establish defendant's title, but as tending to show whether there was such a confusion of goods that the officer was justifiable in taking possession of more apples than belonged to the plaintiffs. — *Sleight v. Henning*, 371.

22. *Evidence of title to land.* — A deed of lands is no evidence of title in the grantor, where he is not otherwise connected with the title, or shown to have ever had possession. — *Smith v. Lawrence*, 431.

23. *Plat book.* — A book of township plats, found in the office of the register of deeds, is not admissible in evidence, where there is no law requiring it to be kept, or declaring it to be evidence. — *Ibid.*

24. *Parol evidence to show terms of sale where a written instrument exists.* — An instrument in the following form:

"J. G. W, bought of C. G. R.,
1862, March 24, 1 frame building," &c.
"Received payment, $419, C. G. R," — is not conclusive of the terms and conditions of the sale, and does not exclude parol evidence to show that the property mentioned was not to be delivered till paid for in the manner verbally agreed upon at the time of sale. — *Rowe v. Wright*, 289.

Digitized by Google

25. *Witness giving reasons for his attention to the facts to which he testifies.*—A witness may be allowed to state any reason or circumstance which induced him to give particular attention to the facts observed by him, and to which he has testified.—*Angell v. Rosenbury*, 241.

26. *Proof of record without giving copy.*—The deposition of a register of deeds to the contents of deeds recorded in his office, without giving copies thereof, is inadmissible. And when the purpose for which it is offered is collateral to the issue, the rule is the same as in other cases.—*Ibid.*

27. *Presumption as to objection to incompetent interrogatories having been waived.*—Incompetent testimony having been taken on interrogatories and cross interrogatories under a commission, and the Court below having overruled objections thereto, the case was brought up for review on exceptions. On error, it was claimed by the party who had offered the evidence, that error could not be presumed, and as the record did not show how the interrogatories were settled, it must be presumed that objection was waived, and the putting of a cross interrogatory which called for and elicited evidence of the same nature was a waiver of any objections to the evidence brought out by the direct interrogatory. But it was held — nothing appearing to the contrary — that it must be presumed the interrogatories were settled in the usual way, under the statute and rules; and in such case the party may make objection to the competency of the evidence for the first time at the trial. (Comp. L. §§ 4257, 4248.)—*Ibid.*

See ASSIGNMENTS FOR THE BENEFIT OF CREDITORS; EQUITY, 33 TO 36 PRACTICE IN CIRCUIT COURTS, 8.

EXCEPTIONS.

See PRACTICE IN SUPREME COURT, 1, 6, 7, 8.

EXECUTORS AND ADMINISTRATORS.

1. *Administrator's right to possession of lands: ejectment by heir.*—The statute — Comp. L. § 2904—authorizing executors and administrators to take possession of the lands of the deceased, does not exclude the possessory rights of the heir, but merely permits the personal representatives to claim and have possession, until a sale by them under the order of the Probate Court, or until the final settlement of the estate, if they see fit to demand it, unless ordered to deliver it over to the heir by the Probate Court.—(Streeter v. Paton, 7 Mich. 341.)—*Marvin v. Schilling*, 356.

Digitized by Google

2. The heir, therefore, when possession has not been demanded by the personal representatives, may maintain ejectment against third persons.—*Ibid.*

3. *Costs against estates of deceased persons.*—Where an executor resisted a claim against the testator in the Circuit Court, and after decision by that Court allowing it, removed the case to the Supreme Court, and that Court was of the opinion that there was no reasonable ground for thus resisting the claim, costs of the Supreme Court were awarded to the claimant.—*Dodge v. Stanton*, 408.

EXEMPTIONS.

See ASSIGNMENTS FOR THE BENEFIT OF CREDITORS, 4.

EXPERTS.

See EVIDENCE, 4, 5, 6, 7, 8, 9.

FINDING OF FACTS.

See PRACTICE IN CIRCUIT COURTS, 3.

FORECLOSURE OF MORTGAGE.

See EQUITY, 19 TO 24, 26, 44, 45, 47 TO 50; MORTGAGE OF LANDS.

FORMER SUIT AS A BAR.

See EQUITY, 12, 14; PLEADINGS, 1.

FRAUDS, STATUTE OF.

1. *Representations as to credit, &c., of another; promise to answer for debt of another: interest in lands.*—Suit on a guaranty, not in writing, that certain notes sold by defendant to plaintiffs were good and collectable, and the makers responsible; and that the maker of a certain mortgage sold at the same time was responsible and able to pay; that the land mortgaged was ample security and the title perfect and unincumbered. Held, that the guaranty was not within the prohibitions of the Statute of Frauds, and was valid.—*Huntington v. Wellington*, 10.

2. Such guaranty is not within the provision which exempts persons from being charged upon parol representations concerning the credit and ability of others; as that is confined to cases where the representations form no part of a contract.—*Ibid.*

Digitized by Google

3. Nor is it an agreement to pay the debt of another, in the sense of the statute requiring such undertaking to be in writing. Where a guaranty is cotemporaneous, and made upon the same consideration with the original debt, or where it is made subsequently upon some new consideration of forbearance or otherwise, and is really a collateral promise to the undertaking of another, it must be in writing, or it is void. But where the guaranty of another's debt is merely incidental to a principal contract made by the guarantor himself, on his own account, it is regarded as in effect, a promise to pay his own debt, and therefore need not be in writing. — *Ibid.*

4. The guaranty of the mortgage is not within the statute (§ 8177 *of Comp. Laws*), which provides that "no estate or interest in lands, except," &c., "nor any trust or power over or concerning lands, or in any manner relating thereto, shall hereafter be created, granted, assigned, surrendered or declared, unless" "by deed or conveyance in writing," &c. It does not in any way affect the title to land, nor does it raise or affect any trust, power or authority in or over the land mortgaged. It is simply an undertaking that certain facts exist; and if inserted in a deed of conveyance, would be simply a personal covenant which would not run with the land. — *Ibid.*

5. *Promise to pay debt of another.* — Where A had taken a contract to do work for B, but not being paid, had abandoned the contract, and afterwards resumed it and did certain extra work on the promise of C to pay him; but the evidence showed that he still looked to B for his pay, and not to C except as guarantor, it was held, that the promise of C, not being in writing, was void under the Statute of Frauds, both as to the extra work, and that done under the contract. — *Bressler v. Pendell*, 224.

6. Contractors for the construction of a railroad gave their workmen certificates of the amount due them, which were presented to and accepted by the railroad company. Upon these certificates the plaintiffs furnished goods, which they charged to the contractors. In a suit brought against the contractors to recover the price, it was made a question before the jury whether the goods were furnished on the credit of the contractors, or of third persons who, according to some of the evidence, were to make advances. The Judge charged the jury that if the goods were furnished under an arrangement with the contractors, or if they subsequently assented to the goods being charged to them — in either case they would be liable. Whether the latter

Digitized by Google

branch of this charge was correct, *quere:* the Court being equally divided on the question. — *Farwell v. Dewey*, 486.

FRAUDULENT CONVEYANCES.

See ASSIGNMENTS FOR THE BENEFIT OF CREDITORS.

GARNISHEE PROCEEDINGS.

1. *Recovery against garnishee on evidence contradicting his.* — A recovery can not be had against a garnishee on evidence contradicting his own statement that nothing is due from him to the principal debtor. (Newell v. Blair, 7 Mich. 103.) — *Thomas v. Sprague*, 120.

GOVERNOR AND JUDGES OF MICHIGAN TERRITORY.

See RATIFICATION.

GUARANTY.

1. *When continuing.* — The following was held not to be a continuing guaranty, but to be limited to a single purchase or transaction: "St. Joseph, Sept. 18th, 1858. Joseph Gard, Dear Sir: If you will let the bearer have what leather he wants, and charge the same to himself, I will see that you have your pay in a reasonable length of time. J. E. Stevens." — *Gard v. Stevens*, 292.

2. *Application of payments.* — Held further, that the first moneys afterwards received by the creditor on the debtor's general account, should be applied in payment of the leather sold on the guaranty. — *Ibid.*

GUARDIAN AND WARD.

1. *Sale of lands by guardian: defective petition: fraud.* — License was granted by the Probate Court which appointed a guardian, for the sale of lands by him. The sale was made, and a deed given in pursuance thereof. It was held that, under Compiled Laws § 8092, a person claiming adversely to the title of the ward, could not contest the validity of the sale on the ground that the petition for license to sell was defective. — *Marvin v. Schilling*, 356.

2. Nor can he contest it on the ground that the sale was a fraud upon the ward. If there is anything wrong in the proceedings

Digitized by Google

it may at a proper time be inquired into by the ward, or any one claiming under him; but a third person can not drag the ward's rights into Court in a litigation between himself and the purchaser. — *Ibid.*

3. *Redemption by guardian.* — A guardian has a clear right to redeem his ward's lands from a mortgage sale. — *Ibid.*

HEIRS.

1. The word not necessary in a deed of trust to convey a fee. — *Angell v. Rosenbury*, 241.

HIGHWAYS.

1. *Laying out highway: whole road applied for, or none of it, should be laid out.* — Where application is made to the highway commissioners to lay out a highway, under the statute of 1861, the commissioners must lay out the whole road applied for, or no part of it. — *People v. Township Board of Springwells*, 434.

2. *Laying out highway: who may complain of erroneous action.* — Where a road is regularly applied for, and the commissioners decide to lay out a part of it only, any person through whose lands the road runs as laid, is entitled to take proceedings to test the validity of their action — *Ibid.*

3. *Costs against body acting judicially.* — Application in due form having been made to highway commissioners for laying out a road, and they having made an order laying out a part of it only, and the township board on appeal having confirmed their action, the Supreme Court, on quashing these orders on certiorari, refused to award costs, as the township board was acting judicially on an application giving the commissioners jurisdiction. — *Ibid.*

See CERTIORARI AT THE COMMON LAW, 4.

ILLEGAL CONTRACT.

See CONTRACT, 1; 4; INSURANCE AGAINST FIRE, 1; PLEADINGS, 2, 8; PROHIBITORY LIQUOR LAW.

IMPEACHMENT OF WITNESS.

See EVIDENCE, 12, 13, 17.

Digitized by Google

INCUMBRANCES.

See Election of Remedies; Mortgage of Lands.

INDEMNITY.

See Mortgage of Lands, 1, 2.

INDICTMENT.

See Criminal Law, 1, 2.

INDORSER.

See Bills of Exchange and Promissory Notes; Equity, 12, 18.

INFORMATION.

See Criminal Law, 1, 2.

INJUNCTION.

See Equity, 6, 29, 30.

INNKEEPER.

1. *Liability of: Who is a "guest."* — In order to make one liable as inn-keeper at the common law, for goods lost at his inn, it must appear that he was acting in the capacity of inn-keeper on the occasion when the goods were received, and that the owner was his guest: in other words, that the latter visited the inn for purposes which the common law recognizes as the purposes for which inns are kept. — *Carter v. Hobbs*, 52.

2. A ball was given by a fire company at the inn of defendant, the defendant furnishing dancing room, supper and dressing room, and being paid therefor by the company, at the rate of one dollar for each supper ticket. The ball tickets were sold by the fire company, at two dollars each, and these were taken up at the door of the dancing room, by a person employed by the fire company, and supper tickets given in their stead. The plaintiff, who was a guest at another inn of the town, went to the ball, purchased a ticket therefor at the baggage room, delivered his overcoat, fur collar and gloves, at the office of the hotel, to the clerk, and registered his name, and remained at the ball until

Digitized by Google

it broke up in the morning, when, on calling for his overcoat, collar and gloves, they could not be found. During the night, the plaintiff had spent some money, for liquors and cigars, at a saloon kept by the defendant in connection with the hotel. It was held that these facts did not show the relation of inn-keeper and guest to exist between the defendant and the plaintiff; that the former did not receive the goods in his capacity as inn-keeper, but merely as an ordinary bailee. — *Ibid.*

INSANITY.

Opinions of non-professional witnesses on questions of: See EVIDENCE, 4 to 9.

INSURANCE AGAINST FIRE.

1. *Insurance of liquors.* — Spirituous liquors illegally kept for sale may, notwithstanding, be lawfully insured against destruction by fire. The risks insured against are not the consequences of illegal acts, but of accidents. — *Niagara Fire Insurance Co. v. DeGraff*, 124.

2. *Description of insured property.* — Where an insurance was effected on "groceries," and there was evidence that the insurer was informed that alcohol and spirituous liquors constituted a part of the stock, it was held that whether they were included in the term "groceries" in the policy was a question of fact for the jury. — *Ibid.*

3. *Conditions in policy.* — A policy of insurance against fire provided that the policy should be void if the premises were used for storing or keeping therein any articles included in certain classes of hazards annexed to the policy, "except as herein specially provided, or hereafter agreed to by [the insurers] in writing upon this policy." It was held that where a stock was insured under the general designation of "groceries," which included some of these hazardous articles, the insurance by this designation *did* specially provide for them "in writing upon the policy. — *Ibid.*

4. A clause in a fire policy which provided that, if gunpowder or other articles subject to legal restriction should be kept in greater quantities or in a different manner than was provided by law, the policy should be void, was held to have reference only to articles of an intrinsically dangerous nature as liable to cause injury accidentally or by carelessness, and not to refer to liquors, the traffic in which was made illegal by statute. — *Ibid.*

Digitized by Google

5. *Insurance by one part owner.* — If one partner insure the partnership property against loss by fire in his own name only, and it does not appear that the insurance was really intended for the benefit of the firm, the premium paid from the partnership funds, and the transaction subsequently ratified by the other partner, the policy will cover only the undivided interest of the partner insuring. — *Peoria Marine & Fire Insurance Co. v. Hall.* — 202.

6. It makes no difference in this respect that the agent of the insurer knew the interest of the parties, and that it was the intention of both the insurer and insured, at the time of issuing the policy, that the insurance should cover the whole. — *Ibid.*

7. The rule may be otherwise where the partner making the insurance has made advances to the firm, which, by agreement, are to constitute a lien on the goods insured. — *Ibid.*

8. Where a policy when made covers the interest of one partner only, the remaining interest can not be brought within it by the partner insured subsequently becoming the owner of the whole. — *Ibid.*

9. *Conditions in policy: limitation of action.* — By one of the conditions attached to a fire policy it was provided that no suit should be brought upon it unless within twelve months next after the loss; and in case any suit should be commenced after the expiration of twelve months, the lapse of time should be deemed and taken as conclusive evidence against the validity of the claim. It was held that if such a condition was valid at all, it was valid as a *contract only*, and that the limitation fixed by it must, upon the principles governing contracts, be more flexible in its nature than one fixed by statute, and liable to be defeated or extended by any act of the insurer which prevents action being brought within the prescribed period. — *Ibid.*

10. Held further, that the insured had the whole of the twelve months within which to commence suit, and that the limitation must rest upon the tacit condition, without which it could not be valid, that the insurer should be accessible to the service of process by which suit may be commenced against him, if not for the whole period, at least for a sufficient time immediately preceding its close to enable the insured to commence his suit in the ordinary legal mode. — *Ibid.*

11. And process having been issued before the expiration of the twelve months, returnable two days after their expiration, and no agent of the insurer — a foreign corporation — being found in the county, upon whom to make service, and new process being

Digitized by Google

issued on the return of the first, it was held that the failure to commence suit within twelve months was sufficiently excused, and the second suit, under the circumstances, was brought in season. — *I bid.*

12. *Conditions in policy: keeping of gunpowder: waiver.* — Where by a fire policy it was provided that the keeping of gunpowder "without written permission in the policy" should render the policy void, it was held that if the agent taking insurance on a stock of goods knew that gunpowder was kept and to be kept, the keeping it would not render the policy void, whether permission to keep it was indorsed or intended or neglected to be indorsed or not. — *I bid.*

13. Notice of this fact to the agent was notice to the principal, and by taking the premium and issuing the policy, the insurer must be regarded as having waived the condition which prohibited gunpowder being kept. — *I bid.*

INTEREST.

See EQUITY, 40; PLEADINGS, 9.

INTOXICATING DRINKS.

See CONTRACT, 1; INSURANCE AGAINST FIRE, 1, 4; PLEADINGS, 2, 8.

JUDGMENT CREDITORS BILL.

See EQUITY, 27, 28.

JUDGMENTS AND EXECUTIONS.

1. *Redemption by judgment creditors from sales.* — Judgment creditors who were entitled, under § 3147 of Compiled Laws, to acquire the rights of a purchaser of premises sold on execution, applied to the purchaser for that purpose, and took from him an assignment of his certificate of sale, but without having presented him with the statutory proofs of their title to acquire such rights. Held, that where the application was thus made to the purchaser himself, and evidences produced which were satisfactory to him, it was sufficient; though if the application had been made to the register of deeds or sheriff, the statutory proofs must have been produced. — *People v. Fralick*, 234.

2. Held further, that the creditors, by thus taking an assignment of the certificate of sale, did not debar themselves from holding as

Digitized by Google

judgment creditors under the statute; and that a subsequent creditor applying to become purchaser of the premises under the statute must pay their judgment as well as the original bid. — *Ibid.*

3. *Setting aside judgment.* — See PRACTICE IN CIRCUIT COURTS, 9.

JURISDICTION.

See EQUITY, 7, 18.

JURY TRIAL.

See ERROR, 1, 2, 3, 4; PRACTICE IN CIRCUIT COURTS, 2, 3, 4.

JUSTICES COURTS.

See CERTIORARI TO JUSTICES OF THE PEACE.

LACHES.

See EQUITY, 11.

LAND CONTRACT.

1. *Effect of vendor terminating it.* — A vendor having, on default by the vendee, elected to treat as void a contract which he had given for the sale of lands, and having given the vendee notice to quit, must be regarded as having relinquished his right to the amount then due on the contract. He can not treat the contract as void in respect to the rights which it secured to the vendee, and valid in respect to those which it secured to himself. — *Goodspeed v. Dean*, 352.

2. *Effect of release by vendee.* — Where the vendor in an executory contract for the purchase of lands receives from the vendee a quit claim deed of the lands, this is a recission of the contract; and he can not afterwards maintain an action on notes which were given for the purchase price. — *Ives v. Bank of Lansingburgh*, 361.

LANDLORD AND TENANT.

1. *Attornment to third person.* — It is entirely incompetent for a tenant, without the consent of his landlord, to change the nature

Digitized by Google

of his tenancy, by attornment to a third person: — (Byrne v. Beeson, 1 Doug. Mich. 179.) — *Blanchard v. Tyler*, 339.

See CERTIORARI AT COMMON LAW, 1, 2, 3.

LIEN.

See EQUITY, 1

LIMITATION OF ACTIONS.

See INSURANCE AGAINST FIRE, 9, 10, 11; PRACTICE IN SUPREME COURT, 5, 6, 7.

MENTAL CAPACITY.

Proof of. See EVIDENCE, 4 to 9.

MISTAKE.

See EQUITY, 9, 10, 11, 25.

MORTGAGE OF LANDS.

1. *Mortgage conditioned for payment: power of sale on failure to indemnify.* — A condition in a mortgage that the mortgagor shall "promptly pay and discharge all notes or other papers of his upon which [the mortgagees] shall become indorsers or acceptors, together with all the interest, costs and charges accruing thereon, so as to save said parties of the second part harmless by reason of their connection with such paper," is broken at once on a failure to pay the paper at maturity, and a right to foreclose accrues, without further action on the part of the mortgagee. — *Butler v. LaDue*, 173.

2. In a mortgage with the condition above set forth, the power of sale was limited to the case of the mortgagees being damnified by paying the debts. It was held that the power of sale need not be coextensive with the condition of the mortgage, and that the remedy in equity was open for every breach of the condition, whether the parties had seen fit to provide for such breach in the power of sale or not. — *Ibid.*

3. *Nature of a mortgage of lands.* — A mortgage is no longer, in this State, what it was originally at common law, a grant of the land to the mortgagee, defeasible upon condition subsequent and to become absolute on failure to pay at the specified day.

Digitized by Google

It is but a security for the debt. The estate in the land is still in the mortgagor; and payment at any time before foreclosure and sale, or — in case of foreclosure by advertisement — at any time before the expiration of the time of redemption, including legal costs, will discharge the mortgage; and no reconveyance is necessary. — *Caruthers v. Humphrey*, 270.

4. *Mortgage discharged by a tender.* — And where a mortgagor, after the mortgage had become due, but before foreclosure, tendered to the holder the full amount due, which the latter refused to receive, it was held, in a suit subsequently brought to foreclose, that the tender discharged the lien of the mortgage, notwithstanding the money was not brought into Court, and it was not shown that the tender was kept good up to the time of hearing. — *Ibid.*

5. *Attorney fee in mortgage.* — A mortgage empowered the mortgagee in the usual manner to sell, "rendering the surplus moneys, if any there be, to the said [mortgagor], after deducting the costs and charges of such vendue and sale aforesaid, and also $100 as an attorney fee, should any proceedings be taken to foreclose this indenture." It was held, that this fee was limited to the case of a foreclosure under the power of sale; and could not be recovered on foreclosure in equity. — *Sage v. Riggs*, 313.

NAME.

See EQUITY, 24.

NEW TRIAL.

See ERROR, 4.

NOTICE.

1. *Of proceedings of city council.* — Electors of a city are presumed to have notice of the proceedings of the common council, which are published in the official paper of the corporation. They are therefore presumed to have notice of a vacancy which has been declared by the common council. — *People v. Hartwell*, 508.

2. Of Elections: See ELECTIONS.

And see BONA FIDE PURCHASER; INSURANCE AGAINST FIRE, 13; PRACTICE IN CIRCUIT COURTS, 1.

OFFICE AND OFFICER.

See ELECTIONS; QUO WARRANTO.

Digitized by Google

PARTIES.

See EQUITY, 20, 21, 22, 23, 27, 28.

PARTITION.

See EQUITY, 16, 17.

PARTNERSHIP.

See INSURANCE AGAINST FIRE, 5, 6, 7, 8.

PAYMENT.

See CONDITIONAL PAYMENT; GUARANTY, 2.

PLANK ROAD COMPANIES.

See DETROIT & ERIN PLANK ROAD COMPANY.

PLEADINGS.

1. *Plea of another suit pending.* — In a suit commenced by attachment, a plea in abatement was interposed, that *at the time of the commencement of the suit* another suit was pending between the same parties, for the same cause of action. It was held that the plea was bad, because it did not state that the former suit was still pending. (Wales v. Jones, 1 Mich. 254.) *Pew v. Foare*, 16.

2. *Illegal consideration.* — In assumpsit, illegality of consideration between the original parties to a promissory note, may be shown under the general issue. If any notice of a defense under the Prohibitory Liquor Law were necessary, a notice that the note "was given for the purchase price of certain intoxicating liquors, contrary to the statute in such case made and provided," is sufficient. Per MANNING J., CHRISTIANCY J. concurring.—*Myers v. Carr*, 63.

3. *Exemptions from and exceptions in a statute.*—In declaring on a statute, where there is an exception in the enacting clause, the pleader must negative the exception; but where there is no exception in the enacting clause, but an exemption in a proviso to the enacting clause, or in a subsequent section of the act, it is matter of defense, and must be shown by the defendant. Where, therefore, suit is brought for the price of spirituous or intoxicating liquors sold in Michigan, the plaintiffs can not recover

Digitized by Google

unless they bring themselves within the exemptions of the statute. Per MANNING J.; CHRISTIANCY J. concurring.—*Ibid.*

4. *Declaration: variance.*—Declaration against one who had subscribed with others for the erection of a college building at Hillsdale, for the use of the Michigan Central College incorporated at Spring Arbor. The declaration averred that this College decided not to use the building when completed, and the subscribers afterwards renewed their subscriptions, and indebtedness was incurred and the building was completed in reliance thereon. It was shown in evidence, that the renewal of the subscriptions and the erection of the building were *for the benefit of a new college to be established at Hillsdale.* This fact not being averred in the declaration, which only showed a subscription for the benefit of a college not located at Hillsdale, it was held, that no recovery could be had thereon.—*Underwood v. Waldron*, 73.

5 *Execution of contract by agent.*—Where a contract purported to be executed by agents of the respective parties, and it was set forth at length in the declaration, and alleged to be the contract of the parties, the declaration was held sufficient without showing how the agency was constituted.—*Regents of the University v. Detroit Young Men's Society*, 138.

6. Where agents executing an instrument on behalf of a corporation sign their own names and affix their own seals, such seals are merely nugatory, and the instrument is to be regarded as a simple contract, and, if otherwise valid, binding on the corporation as such.—*Ibid.*

7. *Surplusage.*—When a contract thus executed was declared upon as "sealed by the respective parties," and was then set forth in full in the declaration, it was held that the allegation that it was sealed by the parties should be rejected as surplusage. Any allegation in respect to the description or effect of an instrument thus set forth at length, in a matter which must appear upon its face as set forth, is superfluous, and should be treated as surplusage.—*Ibid.*

8. *Profert.*—In declaring upon a contract thus executed, it is not necessary to make profert. But if it were a sealed instrument, no further profert or oyer is necessary where it is thus set forth in full.—*Ibid.*

9. *Interest: demand.*—Where an action was brought for interest due on a contract at a fixed time without any condition, and it was alleged to be unpaid, it was held that no special demand was

Digitized by Google

necessary, and that the breach of the contract sufficiently appeared. — *Ibid.*

10. *Former recovery as a bar: fraudulent concealment of cause of action.* — An insurance agent gave bond to his principals, conditioned to account for and pay over the moneys received by him as such. Judgment having been recovered by them on this bond for money not accounted for and paid over, a scire facias was issued, assigning as a further breach, that the obligor had, before the judgment, received a further sum for which he failed to account, and the receipt of which he fraudulently concealed. On demurrer, it was held that the fraudulent concealment was a sufficient reason for not including this sum in the original pleadings and judgment; — and the demurrer was overruled. — *Johnson v. Provincial Insurance Co.* 216.

11. *Pleadings on information for usurping corporate powers.* — In an information in the nature of a *quo warranto*, it is not necessary to set forth the franchises and privileges alleged to be usurped, except in general terms. It is always the right of the government to call upon those who assume corporate powers, to show by what warrant they do so; and when the defendants set forth their claims by plea, the Attorney General may show by replication the special grounds he relies on. — *People v. River Raisin & Lake Erie R. R. Co.* 889.

12. *Duplicity in pleading.* — A replication which, to show that defendants usurp the franchise of banking, avers that certificates issued by them are in the similitude of bank bills, and also that they are issued with intent to be put in circulation as money, is open to objection for duplicity. — *Ibid.*

13. *Immaterial issue.* — Information, calling upon defendants to show by what right they assume to exercise banking powers. Plea, setting forth a charter of defendants as a railroad corporation, which gave them no authority to issue circulating notes; and stating the issue by defendants of certain certificates which, as described, might or might not be within the statute against unlawful banking, and then denying that defendants have exercised the franchises charged "except as aforesaid." Held, that as the plea neither confessed nor denied the exercise of banking powers, the issue tendered by it was immaterial. — *Ibid.*

14. *Plea: conclusion of.* — Information charging respondent with intruding into a public office; averring that an election to fill the office was held, that relator received a certain number of votes, and that the relator was thereby elected. A plea to this infor-

Digitized by Google

mation, that no election was held for the office, and that no votes were cast for that purpose, should conclude to the country, and not with a verification. — *People v. Hartwell*, 508.

15. *Public statute: allegations in conflict with it.* — A court is bound to take judicial notice of a public statute, and to disregard all allegations in conflict with it. — *People v. River Raisin & Lake Erie R. R. Co.* 389.

See ATTACHMENT, 2, 8.

PLEADINGS IN EQUITY.

See EQUITY.

POSSESSION OF LANDS.

See CERTIORARI AT COMMON LAW; EXECUTORS AND ADMINISTRATORS.

PRACTICE IN CHANCERY.

See EQUITY.

PRACTICE IN CIRCUIT COURTS.

1. *Notice of judgment rendered in vacation.* — The party against whom a decision is rendered by a Circuit Judge in vacation, is entitled to a written notice, either from the clerk or from the opposite party, before the ten days allowed him for making a case commence to run. — *People v. Wilson*, 25.

2. *Juror disqualified: objection made too late.* — Where a party is informed during the progress of the trial that a juror is disqualified, but he omits to object until after verdict, on the ground that evidence of the disqualification is not sooner accessible, he will be held bound by the verdict. (Bourke v. James, 4 Mich. 336.) — *Sleight v. Henning*, 371.

3. *Verdict: putting informal finding into shape.* — Juries rarely give very formal verdicts; and inquiries of the jurors in Court, and amendments for the purpose of putting in due form what the jury mean by their finding, are unobjectionable. — *Ibid.*

4. *Amending verdict.* — A jury brought in a sealed verdict, "We find for the plaintiff the full amount claimed by him on the note." Under objection by defendant's counsel, the plaintiff's counsel was allowed to state to the jury what the amount was, and they then returned a verdict for that amount, in due form.

Digitized by Google

Held, per MARTIN CH. J., that it was unobjectionable. — *Olcott v. Hanson*, 452.

5. *Finding of facts must state conclusions.* — A finding of facts by a Circuit Judge must state the conclusions of fact. If it set forth only the evidence, it is insufficient. (Trudo v. Anderson, 10 Mich. 357.) — *Thomas v. Sprague*, 120.

6. *Case agreed upon: inferences of fact not to be drawn.* — A case agreed upon by the parties, and submitted to the Court for its decision, is not a mere stipulation concerning evidence, from which inferences of fact may be drawn; but it is equivalent to a finding of facts by a Court, or the special verdict of a jury, in which every fact necessary to a recovery must be expressly found. — *Goodrich v. Detroit*, 279.

7. Where, therefore, a contractor claimed to recover of the city of Detroit the contract price of a certain public work, on the ground of negligence on the part of the city in collecting the assessment therefor, and a case was agreed upon and submitted to the Court which only set forth the steps which the city had taken for the collection; it was held, that the Court had no right, on such a case, to find the fact of negligence from the facts agreed upon and set forth. — *Ibid.*

8. *Trial in Circuit Court after reference to an auditor.* — Where a cause has been referred by the Circuit Court to an auditor, under § 4197 of the Compiled Laws, depositions which have been taken by the auditor, and returned into Court with his report, but not attached to or forming a part of it, can not be used as evidence on the trial of the cause in the Circuit Court. — *Beard v. Spalding*, 309.

9. *Setting aside judgment as to one joint debtor.* — Where the Circuit Court makes an order vacating a judgment as to one of two joint debtors, its effect is to vacate it as to both. — *Van Rensselaer v. Whiting*, 449.

See ATTACHMENT.

PRACTICE IN SUPREME COURT.

1. *Amending exceptions.* — This Court will not, by consent of parties, treat that as a part of a bill of exceptions which is not actually incorporated therein by the Judge who settled the same. — *Niagara Fire Insurance Co. v. DeGraff*, 10.

2. *Settlement of case made.* — A case made after judgment for review by this Court, must show on its face that it is settled and

Digitized by Google

signed by the Circuit Judge for that purpose. — *Gard v. Stevens*, 9.

3. *Cases made: evidence.* — Where a case is made for review on the facts, all the evidence must be returned. *Gray v. Howard*, 171. But it is presumed to contain all the evidence, unless there is something on its face indicating the contrary. — *Gard v. Stevens*, 292.

4. *Mistake in assignment of error: amendment.* — An objection to a writ that it is not *tested* "in the name of the People of the State of Michigan," is not sufficient to allow the party to make the point that the *style* of the writ is not "in the name of the People," &c. And as the objection is purely technical, an amendment should not be allowed to rectify it to the overthrow of substantial justice. — *Johnson v. Provincial Insurance Co.* 216.

5. *Writ of error barred by lapse of time.* — A motion to dismiss is the proper form of objection to a writ of error supposed to be barred by lapse of time. — *Teller v. Willis*, 268.

6. *Statute of Limitations: Writ of error.* — The statute limiting the time for bringing writ of error, commences running from the rendition of the judgment, and is not affected by the settlement of exceptions afterwards. — *Teller v. Willis*, 384.

7. *Settlement of exceptions after error brought.* — A party is not obliged to wait until his exceptions are settled before suing out his writ of error. The exceptions, if sealed and filed after error brought, may be brought up like any other omitted portion of the record. — *Ibid.*

8. The Supreme Court will always give a plaintiff in error the benefit of his exceptions, — unless by his fault or laches he has occasioned the delay himself — by extending the time for return, or for the assignment of errors, or by allowing a new assignment, as the case may require. — *Ibid.*

PRIMARY SCHOOL FUND.

See CONSTITUTIONAL LAW, 2, 3.

PRINCIPAL AND AGENT.

See INSURANCE AGAINST FIRE, 6, 12, 13; PLEADINGS, 5. 6.

PRINCIPAL AND SURETY.

See SURETY.

Digitized by Google

PROBATE OF WILL.

Evidence on: See EVIDENCE, 8 to 12; 16 to 20.

PROFERT.

See PLEADINGS, 8.

PROHIBITORY LIQUOR LAW.

1. *Suit to recover money paid for liquors.* — The statute — Comp. L. § 1662 — authorising moneys paid for liquors to be recovered back, is aimed at sales in the ordinary sense of the term, where the title passes from one owner to a new and different one; and not to releases on the dissolution of a partnership. — *Jacobs v. Stokes*, 381.

2. It was accordingly held, that where one partner purchased of his co-partner the interest of the latter in the partnership stock, he could not, under the statute, recover back the money paid for such interest. — *Ibid.*

3. Although the Prohibitory Liquor Law avoids all contracts the consideration of which, in whole or in part, consists of liquors sold in violation of the statute, yet if a purchase includes other articles besides liquors, and has been paid for, the statute does not authorize a recovery by the purchaser beyond the amount actually paid for the liquors. — *Ibid.*

See CONTRACT, 1; PLEADINGS, 2, 3.

[QUIETING TITLES.]

See EQUITY, 3 to 7.

QUO WARRANTO.

1. *Office terminated since information filed.* — An information to try the right to a public office will not be dismissed on the ground that the office has expired since information filed. To oust the incumbent is not the sole object of the proceeding, but, under the statute, if he is found guilty of the intrusion, a fine may be imposed, and costs recovered; and if the relator claims the office, and is found entitled to it, he may recover damages. — *People v. Hartwell*, 508.

See PLEADINGS, 11, 12, 13, 14.

Digitized by Google

RAILROAD CORPORATIONS.

See CORPORATIONS, 4.

RATIFICATION.

1. *Ratification by United States of deed by Governor and Judges.* — Where the Governor and Judges of the territory of Michigan deeded a lot in Detroit, in 1816, in exchange for a conveyance by the grantee of another lot to the United States, and the United States took possession of the last mentioned lot, and occupied it for fourteen years and more, it was held that this ratified and made valid the deed by the Governor and Judges even if originally invalid. — *Farmers & Mechanics' Bank v. City of Detroit*, 445.

RECORDING LAWS.

See BONA FIDE PURCHASER, 1, 2, 3; TITLE TO LAND.

REDEMPTION.

See EQUITY, 40, 44, 45; JUDGMENTS & EXECUTIONS; GUARDIAN & WARD, 3.

REGENTS OF THE UNIVERSITY OF MICHIGAN.

See CORPORATIONS, 1, 2, 3.

RELEASE OF SURETY.

See EQUITY 12, 13; SURETY.

REPLEVIN.

1. *Replevin of property in plaintiff's possession.* — Where an officer, by virtue of an execution, levied upon property in the dwelling house of the judgment debtor, and made an inventory and appraisal thereof, but did not remove the same, and left the house and the property as he found them, but still claiming the property by virtue of the levy, and the judgment debtor brought replevin therefor; it was held that, as the property was in his actual possession at the time of suing out the writ, the action could not be maintained. — *Hickey v. Hinsdale*, 99.

SALE BY GUARDIANS.

See GUARDIAN AND WARD.

Digitized by Google

SPECIFIC PERFORMANCE.

1. *Land contract: failure to pay by the day.* — A contract was made for the sale of lands, the payments to be made to a third person who held a mortgage given by the seller. Payment was not made by the day, and the seller declared the contract forfeited. The purchaser subsequently paid the money to the mortgagee, but without the seller's assent. It appearing that the land contract was designed to provide for the payment of the mortgage, it was held that, when that was done, as it did not concern the seller whether the mortgage was paid one way or another, the contract was to be regarded as substantially complied with. — *Richmond v. Robinson*, 193.

2. *Failure to pay taxes.* — By the contract the purchaser agreed to pay all taxes. The bill did not aver that he had done so. Held that, the purchase price having been paid, the seller had no concern with the payment of taxes, as he could not be compelled to warrant against them, and he did not aver or pretend that he had been made personally liable for them. — *Ibid.*

3. *Time, when essential.* — Time can not be made essential in a contract merely by so declaring, if it would be unconscionable to allow it. Parties may stipulate to make it so, where the stipulation is reasonable; but, as in stipulated damages, if the stipulation is not reasonable, courts will not regard it. — *Ibid.*

4. *Release of dower can not be compelled.* — The wife can not be compelled to release her dower in lands which her husband has contracted to sell; and she is not a proper party to a bill by the purchaser for a specific performance. — *Ibid.*

STATUTES.

See ELECTIONS; PLEADING, 15; STATUTES CONSTRUED OR COMMENTED UPON.

STATUTES CONSTRUED OR COMMENTED UPON.

Laws of 1836. — The act incorporating the River Raisin and Lake Erie R. R. Co. 389

Laws of 1845. — The act incorporating the Michigan Central College, ... 78

Laws of 1848. — The act incorporating the Detroit & Erin Plank Road Co., and the act amendatory thereof, L. 1851, p. 85. 333

Digitized by Google

Laws of 1857. — Provisions in Charter of Detroit relative to claims against the City, ... 279
Provisions in same relative to elections to fill vacancy, . 508
Drainage laws as amended, L. of 1859, p. 499, . . 414
Laws of 1858. — Tax laws: Compensation to Collector, . . 89
Limitation as to proceedings to test validity of tax title, 168
Laws of 1861. — The act allowing parties to be witnesses, . 297
The act for laying out highways, ... 434
Laws of 1863. — The act for paying bounty to volunteers in the military service, ... 191
Compiled Laws: §§ 815, 841, Compensation for collecting taxes, 89
§ 1574, Contracts made on Sunday, ... 378
§ 1662, Contracts for sale of liquors, . . 63, 124, 381
§ 2904, Administrator's right to possession of lands, . 356
§ 3092, Sales by Guardians, &c., ... 356
§ 3147, Redemption from execution sales, . . . 234
§§ 3183, 3186, 3177, Statute of Frauds, . . 10, 224, 436
§ 3249, Modifying decree for alimony, ... 456
§ 3421, Cases agreed upon, ... 279
§ 3437, Finding of facts by Circuit Judge, . . . 120
§ 3438, Cases made after judgment, ... 9, 292
§ 3441, Notice of judgment in vacation, ... 25
§ 3490, Quieting titles to land. 104, 339
§ 3500, Notice in chancery, ... 427
§ 3596, Appeal from chancery, ... 22, 34
§§ 4197, 4202, Trial before auditors, ... 309
§ 4616, Right of tenants in common to partition, . . 540
Ch. 140, Dissolution of attachments, ... 230
Ch. 141, Garnishee proceedings, ... 120
Ch. 151, Who may bring replevin, ... 99
§§ 5311, 5312, Information to try right to public office, . 508
§ 5340, Limitation to writs of error, ... 268, 384
§ 4854, Forfeiture of corporate franchise by non-user, . 527
§ 6047, Omissions in indictment, ... 27
University Laws. — The various statutes relating to the University of Michigan considered, ... 138

SUBSCRIPTIONS FOR PUBLIC PURPOSES.

See CONTRACT, 2, 3.

SUNDAY.

See CONTRACT, 4.

Digitized by Google

SURETY.

1. *Release of surety by discharging securities.* — Where the vendor in a land contract had taken notes payable to his own order for the purchase price, which notes he indorsed to a bank, and at the same time gave the bank a deed of the lands as security for the payment of the notes, and the bank afterwards took from the vendee a quit claim deed of the lands, without the vendor's knowledge, it was held that such deed was a recission of the contract, and that the vendor was thereby discharged from his liability as indorser of the notes, at least to the extent of the value of the land. — *Ives v. Bank of Lansingburgh*, 361.

2. An agreement between the vendee and the bank, at the time of the delivery of the quit claim deed, made without the knowledge of the vendor, that such deed should not affect the liability of the vendee on his notes, would not prevent its having this effect upon the rights of the vendor as indorser. — *Ibid.*

See EQUITY, 12, 13.

SWAMP LANDS.

See CONSTITUTIONAL LAW, 2, 3.

TAXES.

See COLLECTOR OF TAXES; CONSTITUTIONAL LAW, 1; DRAINING SWAMPS, &c.; EQUITY.

TENANTS IN COMMON.

1. *Tenancy in common of crops put in on shares.* — One J. put in wheat on shares on defendant's lands, and was to have possession of the land, and do other farm duties upon shares of other produce. As there was no proof that it was agreed that J's rights in the crops should be forfeited by non-fulfillment of any other conditions, and no evidence of damages from any such non-fulfillment, it was held, in a controversy between defendant and plaintiffs, to whom J had mortgaged the crops while growing, that J was clearly tenant in common of the crop. — *Fiquet v. Allison*, 328.

2. *What amounts to a conversion: assumpsit in case of.* — When the crops were ripened, plaintiffs harvested them, but defendant drew them off, threshed them, placed them in his granary, and refused to recognize any rights of plaintiffs therein, or to deliver their share. *Held*, —

Digitized by Google

First: — That this exclusive possession of the crops, and denial of all right of plaintiffs therein, amounted to a conversion.

Second: — That the tort might be waived and assumpsit brought for such a conversion, although no sale of the grain was proven, except of a trifling portion not equal to defendant's own separate interest. — *Ibid.*

3. The grain being in marketable condition, the defendant in possession was bound, on reasonable request, to have the share of his co-tenants measured out to them; and for a breach of this duty, which the law implied from his express contract, assumpsit is as appropriate a remedy as any other, if plaintiffs see fit to resort to it. — *Ibid.*

See EQUITY, 16, 17.

TENDER.

See MORTGAGE OF LANDS, 4.

TIME.

See SPECIFIC PERFORMANCE, 1, 2, 3.

TITLE TO LAND.

1. *The deeds presumed to show its actual state.* — A partnership of three persons owned lands, which, however, had been conveyed to the three without any reference in the deed to the partnership. It was held that a mortgage given by one of the three on an undivided one-third of the land, to one who had no notice that it was partnership property, was not affected by the partnership equities. Such mortgagee had a right to assume that the common possession of the three was under and in accordance with the record title, and not under some other and parol arrangement. — *Adams v. Bradley*, 346.

See EVIDENCE, 22, 23.

TORTS.

See WAIVER.

TOWNSHIP TREASURER.

See COLLECTOR OF TAXES.

Digitized by Google

TROVER.

Evidence of conversion and value. See ASSIGNMENT FOR THE BENEFIT OF CREDITORS, 7, 8, 9; TENANTS IN COMMON.

TRUSTS.

See ASSIGNMENT FOR THE BENEFIT OF CREDITORS, 16.

UNIVERSITY OF MICHIGAN.

See CORPORATIONS, 1, 2, 3.

USURY.

1. What facts sufficiently prove — *Caruthers v. Humphrey*, 270.

VALUE.

Proof of. See ASSIGNMENT FOR THE BENEFIT OF CREDITORS, 7, 8, 9; EQUITY, 15.

VENDOR AND PURCHASER.

See SPECIFIC PERFORMANCE.

VERDICT.

See PRACTICE IN CIRCUIT COURTS, 3, 4.

WAIVER.

1. *Of tort.* — A plaintiff may recover on a declaration for pasturing cows, on proof showing that his land was used by the defendant for that purpose. If the use was without the plaintiff's consent, defendant was a trespasser, and plaintiff might either sue him in trespass, or waive the trespass and sue in assumpsit. Per MANNING J., MARTIN CH. J. concurring. — *Welch v. Bagg*, 41.

See also TENANT IN COMMON.

2. *Of conditions.* — See Insurance against Fire, 3, 4, 12, 13.

WAY.

1. *Classification of.* — Ways must be either public or private; there

Digitized by Google

is no intermediate species of way for any purpose of passage. — *Tillman v. People*, 401.

2. *Acceptance of dedication.* — The adoption by the Governor and Judges of the plan of the city of Detroit, and the laying down of a street upon the plat made by them, did not, of itself, constitute it a street or highway: this was but a naked dedication, which could only become effectual when accepted by the proper authorities on behalf of the public. (People v. Jones, 6 Mich. 176). — *Ibid.*

3. The acceptance should be manifested by some act of the public authorities, either formally confirming or accepting the dedication, and ordering the opening of the street, or by exercising authority over it in some of the ordinary ways of improvement or regulation. — *Ibid.*

4. Where an alley was laid down on the plan of Detroit adopted by the Governor and Judges in 1806, and there was no act on the part of the public authorities accepting it, but the owners of adjoining lots were allowed to keep a large portion of it closed, and to erect valuable improvements upon and over it, until 1868, it was held, that it was now too late for the city to acquire any public rights in the part thus allowed to be closed, acceptance alone. — *Ibid.*

5. *Cul de sac.* — Held further, that as that part of the alley not thus closed was but a cul de sac, furnishing means of access to the rear of the lots upon each side, it could only be considered as an easement appurtenant to those lots, and in no sense a highway. (People v. Jackson, 7 Mich. 432.) — *Ibid.*

6. The parties interested in the adjacent lots would have a right to close this cul de sac, or to regulate its use as to them should seem proper, so far, at least, as respects its use as a way for passage or travel. — *Ibid.*

7. And it makes no difference, in this respect, that buildings erected along it, but since removed, were for a time used as dwellings. Any right of way depending upon such use of the buildings would cease when the buildings were removed. — *Ibid.*

8. *Dedication for other purposes than for ways: acceptance.* — If the laying down of alleys, by the Governor and Judges, on the plan of Detroit, is to be treated as a dedication for any public purpose besides that of ways for passage or travel, an acceptance or adoption of that dedication was just as essential to give them a public character, for any other purpose, as to give them that character as ways. — *Ibid.*

Digitized by Google

WILL.

1. *What necessary to validity.* — A will is not valid unless the testator not only intends, of his own free will, to make such disposition, but is capable of knowing what he is doing, of understanding to whom he gives his property, and in what proportions, and whom he is depriving of it as heirs, or as devisees under the will he revokes. — *Beaubien v. Cicotte*, 459.
2. *Evidence on probate of.* — See EVIDENCE, 6 to 12; 16 to 20.

WITNESS.

See ERROR, 7; EVIDENCE.

WRIT OF ERROR.

See ERROR; PRACTICE IN SUPREME COURT, 5, 6, 7.

Digitized by Google

4859-135

Digitized by Google

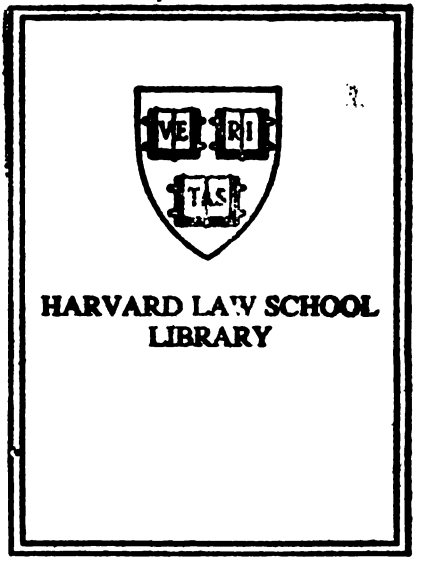
Digitized by Google

Digitized by Google

Digitized by Google

Digitized by Google

Google



Digitized by Google